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**RESPONSIBLE GOVERNMENT  
IN THE DOMINIONS**

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# RESPONSIBLE GOVERNMENT IN THE DOMINIONS

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PART IV

**THE FEDERATIONS AND THE UNION**

*(continued)*



## II

### THE COMMONWEALTH OF AUSTRALIA

#### § 1. *The History of Federation*

ANXIETY at the growing power of the United States and the perturbation of the Imperial Government over the failure of Canada to pass the Militia Act suggested in 1862, unquestionably contributed in considerable degree to induce the Colonial politicians to form, and the Imperial Government to support, the idea of a federation of the Canadian territories. It was different in Australia; if the Crimean war and rumours of Russian hostility to Britain and intrigue in Afghanistan in 1877-8 and 1885 aroused some anxiety in Australia, it was but faint and the effect was evanescent. Indeed the first result of federation was a prompt decrease in the numbers and efficiency of the defence forces of the Commonwealth. The speed with which federation was consummated in Canada was due to the pressure of the situation of the time with possibilities of Fenian intrigues and anxiety lest adventurers from the United States might cut off Canada from the west. In Australia, where defence formed no driving force, federation was the slow outcome of the most lengthy deliberation.<sup>1</sup>

The dominant motive for federation lay in trade and customs. As early as 1842 New South Wales was ready to give Tasmania and New Zealand free trade, but the Imperial Government, on 28 June 1843, disapproved of differential duties. Sir C. Fitzroy, on 29 September 1846, suggested that there should be a Governor-General for Australia to consider Acts on trade issues, and Lord Grey, with the approval of the Privy Council Committee on Trade and Plantations, approved in 1849 the proposal, and in the Act to constitute the Colony of Victoria in 1850 it was proposed to provide for a federal legislature with power to enact a tariff and to deal with posts; roads and railways; shipping and harbours; weights and measures; and matters referred to it by the Colonies; to create a Supreme Court; and raise

<sup>1</sup> Quick and Garran, *Const. of Commonwealth*, pp. 79-252; Harrison Moore, *Commonwealth of Australia*; Egerton, *Federations and Unions*.



revenue. The proposal was not welcomed, but Lord Grey created a semblance of an executive by having Sir C. Fitzroy made Governor-General of Australia, and appointing him Governor of the existing Colonies save Western Australia. But from 1855 the Lieutenant-Governors were transformed into Governors and the Governor-General disappeared when, in 1861, a new commission was issued for the Governor of New South Wales and a titular Governor-Generalship was not accorded. No doubt men like Wentworth, Deas Thomson in New South Wales, and Gavan Duffy in Victoria were anxious to see a federal legislature, but in 1855 the Acts giving New South Wales and Victoria responsible government were passed without provision being made for the wider prospect. In 1860 hopes were raised by the arrangement of a Conference, but change of Government in New South Wales, and the strong objection of Queensland to curtail any of her newly acquired freedom, led to nothing being done. In 1863 a Conference on the tariff issue declined, without instructions, to consider federation. Yet there were great difficulties as to customs, considering the land frontiers of the Colonies, and in 1862 South Australia suggested internal free trade, without response. In 1867 a Federation Bill was passed in New South Wales, but nothing was done to make it operative by the Imperial Government. In 1873 <sup>1</sup> permission was tardily conceded to the Colonies to arrange for free trade among themselves and New Zealand, which hitherto had been hampered by Imperial Legislation against differential duties ; but Victoria was now so devoted to a high tariff that all she would agree to was entry of her manufactures free into the rest of Australia without equally free entry for agricultural products from other parts into the Colony.

On the other hand, events abroad quickened interest in greater unity. One aspect of this interest was curious. Mr. Gavan Duffy was moved by the issue of the neutrality of Belgium to secure the approval of a Royal Commission in Victoria <sup>2</sup> for the idea of an application to the Imperial Govern-

<sup>1</sup> *Parl. Pap.*, C. 576, 703 ; 36 & 37 Vict. c. 22. On the Murray river arrangements, see the Acts, New South Wales, 19 Vict. No. 21 ; Victoria, 17 Vict. No. 17 ; South Australia, No. 6 of 1856.

<sup>2</sup> *Victoria Parl. Pap.*, 1870, Sess. 2, ii. 247. The *Volksstem* in 1911 revived the idea.

ment to secure for the Colonies the position of neutral states, an idea which was derided in the Colony and still more outside of it, and made no further progress. But anxiety regarding the French penetration of the Pacific, stirred by fears of the results of the deportation of convicts to New Caledonia from 1864, continued when transportation to Western Australia ceased in 1867, resulted in pressure on the Imperial Government to annex Fiji in 1874 and to assert in 1878 British interests in the New Hebrides. The interest of the United States in Samoa began in 1875, and in 1880–1 a Conference at Melbourne and later at Sydney<sup>1</sup> showed that federal ideas were stirring, though Victoria,<sup>2</sup> Queensland, and New Zealand were not willing to accept any Federal Council. The appearance of German claims in the Pacific and anxiety over New Guinea produced more striking results. Queensland purported to annex New Guinea so far as not already in the hands of the Dutch, but the action was disavowed by the Imperial Government, which, however, pointedly hinted at federation as a proper preliminary to the fulfilment of Australian ambitions to take a more active part in the control of the Pacific. Mr. Service, Premier of Victoria, then secured the meeting of a Conference at Sydney in November 1883 at which federation was discussed. New Zealand and Fiji were represented as well as the six Colonies, and the Conference agreed on pressing for annexation of New Guinea, control of the New Hebrides, protested against the introduction of convict labour into the Pacific, and demanded a Monroe doctrine for Australia. It concurred in securing an Imperial Act to create a Federal Council with powers of a definitely limited kind, and on addresses from the Colonies other than New Zealand and New South Wales—Sir H. Parkes had become convinced that such a Council would be a ‘rickety body’—the desired Council was created by Imperial Act of 1885.<sup>3</sup> Mr. James Bryce opposed it in the Commons, Lord Carnarvon championed it in the Lords. The powers of the Council were to legislate on the relations of Australasia with the islands of the Pacific; the influx of criminals; fisheries in Australasian waters beyond territorial limits; intercolonial service of process, enforcement of judgements and criminal process;

<sup>1</sup> New South Wales, *Ass. Votes*, 1881, i. 329.

<sup>2</sup> Victoria, *Votes*, 1880–1, iv. 459.

<sup>3</sup> 48 & 49 Vict. c. 60.

extradition of offenders, and their custody on Colonial ships beyond territorial limits ; any matter referred by the Crown to the Council on the request of the Colonial Governments ; any matter of general Australasian interest referred by two or more Colonial Legislatures to the Council ; and questions of the relations of two or more Colonies referred by the Governors with the assent of the Legislatures. Bills of the first three classes were to be reserved, if not previously approved by the Crown, by the Governor of the Colony where the Council met ; it was to be convened at least once in two years, by the Governor of the Colony in which it had been agreed to hold the next session. It was also given the power to make representations to the Crown on matters of general interest or the relations of Australasia with the possessions of foreign powers. Its laws were to override Colonial laws repugnant to them, and its measures were to be carried by individual votes. But it had no executive authority, no power to raise revenue or expend money, and, despite the fact that the need of a Court of Appeal had been felt since 1861 at least, no power to create such a body. Further, representation was strictly optional, each Colony other than Fiji being represented by two members, until by Order in Council of 1894 the number was enlarged, and no legislation of importance could be carried, since New South Wales and New Zealand never sent representatives, and South Australia was only represented at a meeting of 1889, the Legislative Council of 1892 refusing to pass the Bill to permit resumption of membership.

The Council met in 1886 and legislated as to intercolonial enforcement of judgements, in 1888 and 1889 it dealt with pearl shell and *bêche-de-mer* fisheries off Queensland and Western Australia ;<sup>1</sup> in 1891, with recognition of orders in lunacy ;<sup>2</sup> in 1893, with the garrison of King George's Sound and Thursday Island.<sup>3</sup> In 1895 it passed resolutions in favour of uniformity in company, banking, and quarantine legislation, and the representation on the Judicial Committee of the Privy Council of the Australian bench, to which effect was given by the passing of an Imperial Act and the selection of Sir S. Way for the—really honorary—post. In 1897 it provided, at the

<sup>1</sup> 51 Vict. No. 1 ; 52 Vict. No. 2.

<sup>2</sup> 49 Vict. Nos. 3, 4 ; 54 Vict. No. 1 ; 60 Vict. No. 2.      <sup>3</sup> 56 Vict. No. 1.

request of Victoria and Queensland, for recognition *inter se* of naturalization certificates,<sup>1</sup> and of all four Colonies for the compulsory production of testamentary instruments. Its last meeting was in January 1899 at a time when federation was at hand. It interposed no difficulty in the way of federation, and, on the whole, its existence rather told in favour of the fuller measure than otherwise.

True federation was at the same time being brought nearer by considerations of the need for uniformity and co-operation in many matters, which formed the subject of intercolonial conferences of ministers or experts, and whose necessity inevitably gave advocates of change a theme for argument. Sir W. Jervois's inspection of Australian defences in 1878 led to recommendations for further defence arrangements, and the Sydney Conference of 1881 admitted that Australia really ought to undertake her military defence, while holding that naval defence ought to be an Imperial burden ; this conclusion Lord Carnarvon's Royal Commission on defence emphatically dissented from on 23 March 1882. Admiral Sir G. Tryon was fortunate in his negotiations in 1885 with Australia, and paved the way for the agreement, at the Colonial Conference in London of 1887, that Australia should accept the duty of finding £226,000 towards the cost of a naval squadron, to be maintained definitely under agreement on the Australasian station. A military officer was to be sent to inspect Australian defence by the Imperial Government. Sir H. Parkes, however, withdrew from this arrangement, with the result that in 1889 the Imperial Government dispatched Major-General Sir J. Bevan Edwards to report on the situation. He did so on 9 October, advocating federation for defence purposes, and Sir H. Parkes became a convert to the idea of federation. Under his influence a meeting of accredited delegates was held in Melbourne in February 1890 to pave the way for a formal conference, which was duly held at Sydney in March–April 1891. The Colonies, other than New Zealand, which sent three representatives, were represented by seven spokesmen apiece, usually two from the Council, appointed under Acts of 1890–1. It was agreed that federation for customs and defence was desirable ; that only so much power should be given to the federation as was essential ; that the

<sup>1</sup> 60 Vict. No. 1.

States should not be divided save by their own consent ; and that a federal constitution should be drafted to be submitted for consideration to the Parliaments, on the understanding that, if three accepted it, the Imperial Government was to be asked to federate those three. But Sir H. Parkes now fell on evil days, and, when Mr. George Dibbs succeeded him, it was rather as an exponent of the doctrine of the union of New South Wales and Victoria, which failed to attract favour. But popular opinion had been moved ; the Australian Natives Association from 1890 worked in favour of it, and a popular meeting at Corowa in 1893 proved that the matter had ceased to be one merely of interest to advanced politicians, and was being transmuted into an effective popular demand.

In January 1895 the Premier's Conference at Hobart made a definite advance. It was agreed, on the proposal of New South Wales, that delegations of ten members elected by the electors in each Colony should meet to frame a constitution, to be submitted to a referendum in each, when drafted, Acts to provide for the appointment and referendum to be passed forthwith in the Colonies. This was done by New South Wales and South Australia in 1895, by the others, save Queensland, where the Houses quarrelled, in 1896 ; the majority at the referendum was fixed in New South Wales at 50,000, increased by Act No. 34 of 1897 to 80,000 ; in Victoria at 50,000 ; in South Australia at a simple majority ; in Tasmania and Western Australia at 6,000 ; in the latter case the members were to be elected by the two Houses by ballot, not popularly, and the Bill drafted was not to be submitted to the people without the consent of Parliament. The convention met in March 1897 at Adelaide, and, after drafting, on the basis of the draft of 1891, a federal constitution, it adjourned to meet at Sydney in September, in order to consider then the amendments suggested by the Parliaments. The larger States desired more deference to population, the smaller to State rights, the Senate and Finance formed vehement subjects of controversy. Finally, after a move to Melbourne, the draft was completed in 1898. But neither Queensland nor Western Australia took any action on it, and, though it succeeded in obtaining the necessary majorities in Victoria, South Australia, and Western Australia, the majority in New South Wales was only one of 71,595 to

66,228 ; the Labour party there disliked the refusal to use the referendum to settle deadlocks ; there was dislike of equal representation in the Senate, to the financial advantages which would accrue to Tasmania and Western Australia at the expense of the Colony, and to the certainty of a protective tariff. But Mr. G. Reid was not prepared to defeat federation against the popular will, and he used the situation to secure concessions for New South Wales, after obtaining approval of his policy from the electors at a keenly disputed election in 1898. On 29 January a Premiers' Conference at Melbourne conceded changes in the draft ; these included the provision of an absolute majority in lieu of a two-thirds majority at a joint session consequent on a deadlock ; the limitation of the provisions of the constitution regarding the payment to the States of the surplus customs revenue to ten years ; the giving of permission to Parliament to make grants to necessitous States ; the safeguarding of the States by requiring the sanction of the electors to changes in their boundaries ; and the application of the deadlock clauses to cases of amendment of the constitution. It was now found possible to muster 107,420 to 82,741 votes, and Queensland was moved to take a referendum resulting in a decided victory, though Rockhampton and the south opposed the change. The five Colonies now addressed the Crown for an Imperial Act and sent delegates to press their cause,<sup>1</sup> while New Zealand, which had stood out since 1891, and Western Australia sent memoranda asking for permission to join in future, and in the latter case for customs concessions and an intercolonial railway, as in Canada. New Zealand suggested that, if she did not join, there might be provision for her to share the High Court, and to arrange joint military and naval defence. The delegates who conferred with Mr. Chamberlain had to admit that the Commonwealth was a Colony ; and the demand for wide powers in s. 5 of the proposed Act, to which the constitution was to be attached, giving effect to Common-

<sup>1</sup> *Commonwealth of Australia Constitution Bill* (1900) ; Clark, *Australian Const. Law*, pp. 335-57 ; *Parl. Pap.*, C. 6025, 6466 ; Cd. 124, 158, 188. The Adelaide, Sydney, and Melbourne Debates are all printed. For Deakin's share in winning public opinion, see Murdoch, pp. 151 ff., 180 ff. For the agitation on the gold fields which forced Western Australia to come in, see Battye, *Western Australia*, pp. 448 ff.

wealth laws on ships whose first port of clearance and port of destination were in the Commonwealth, was only agreed to with some hesitation, mainly because there had been already a wider power conceded to the Federal Council, though not exercised. On appeals there was a hot dispute; the draft constitution proposed to forbid any appeals on the constitution of the Commonwealth, or a State, unless the public interests of some other part of Her Majesty's dominions were concerned. This was objected to, and the unfettered right of appeal was pressed for, or, in lieu, appeal if desired by the Executive Government of the Commonwealth or a State. Mr. Chamberlain also elicited from the Chief Justices of the Colonies that they did not desire to see the appeal restricted, and a meeting of Premiers would have preferred to waive the clause rather than risk the passing of the Bill. But pressure by the opposition, on party rather than public grounds, and the urgent appeals of the delegates induced Mr. Chamberlain to yield, and the absurd compromise was accepted, forbidding an appeal on issues of the constitutional powers of the Commonwealth, and a State or States *inter se* or of States *inter se*, with power to the Court itself to allow appeals if it thought fit.

The passing of the Act, 63 & 64 Vict. c. 12, was immediately followed by an appeal by Mr. Chamberlain to Western Australia to come into federation; the result was the holding of a referendum, which gave an affirmative reply by 44,800 to 19,691, and when on 17 September a proclamation was issued creating the Commonwealth from 1 January 1901, all six States were included. The Governor-General was then appointed and proceeded to take up his duties on 1 January, obtaining as Prime Minister Mr. E. Barton after Sir W. Lyne had, in perfect conformity with propriety, though Lord Hopetoun's action has often been censured, been asked if he, as Premier of the senior State, was able to form a Government. In similar circumstances Lord Gladstone in the Union of South Africa asked General Botha for a Ministry, passing over the claims of Mr. Merriman. By a happy innovation, wrongly censured on constitutional grounds,<sup>1</sup> the Duke of York was sent to open the first Parliament of the Commonwealth.

<sup>1</sup> Clark, *op. cit.*, pp. 352 f.; cf. Tasmania, *Parl. Pap.*, 1909, No. 14. So the Duke of Connaught in the Union in 1910. For an attack on Lord Hopetoun, see Murdoch, *Deakin*, pp. 209 f.

§ 2. *The Commonwealth and the States*

There is a certain distinction between the frame of the Commonwealth constitution and that of Canada. In the latter, though its character is truly federal, the fact that the residual power was to be given to the Dominion resulted in a different measure of importance being attached to the definition of functions of the federation and the provinces, and the powers of each are accordingly set out in detail. In the case of the Commonwealth the Act emphasizes in its form the fact that the States were uniting to form a new entity with powers in some matters exclusive of those of the States, in others covering the same ground, but paramount in case of conflict, but in many other spheres not infringing State sovereignty. The whole stress of the Act lies in the creation of a Federal Parliament (section i), of a federal executive (ii), a judicature (iii), in the laying down of rules as to finance and trade (iv), while only a short section (v) is given to the States, and the creation of new States is regulated (vi), the seat of Government and the appointment of deputies are provided for (vii), and the mode of altering the constitution defined (viii). The essential position regarding the States is their continuance in existence with their old constitutions—the possibility of change was discussed during the federation debates; but the opposition was conclusive—whereas in the case of Canada the subordination of the Lieutenant-Governors to the Governor-General, and the federal power of disallowance, mark immediately a predominance on the part of the federation. So also the distribution of powers in Canada was based on the predilection of many of the framers of the constitution for a unitary form of régime, while, in the Commonwealth, the insistence on defining only the powers of the Commonwealth, leaving all else to the States, and on providing a High Court with almost exclusive power of settling disputes between the Commonwealth and the States, testifies to the great weight of American precedent<sup>1</sup> on the formation of the constitution. It might *a priori* have been expected that American precedent would more strongly have affected the

<sup>1</sup> Clark, *Australian Const. Law*, pp. 358-87. Note that South African opinion felt that Canadian federalism is too rigid in its legalism, and that federation perpetuated nationalism; Walker, *Lord de Villiers*, pp. 434 f.



Canadian statesmen who framed the *British North America Act*, but they lived too near the United States to ignore the disadvantages of a constitution which left a plausible excuse to States to assert honestly the right to secede, and the recollection that the judgements of the Supreme Court had played an important part in rendering the secession movement in the United States ultimately inevitable, and that the court was popularly believed to be moved by political bias, as in the *Dred Scot* case, told against any undue emphasis on creating a court of great strength. Allowance must also be made for the influence of British statesmen on the drafting of the Act, and on the greater proximity of Canada to the United Kingdom, which has diminished the objections to appeals to the Privy Council, while racial and linguistic differences have impressed on Canadians the benefits of recourse to a tribunal free from bias on these grounds.

The impossibility, however, of reproducing American conditions in the Commonwealth is shown by the utter failure of the attempt to create a Senate which would be truly federal. The device of giving each State six Senators, permitting change only subject to the rule that the original States shall never have less than six and shall always have the same number, was intended to secure the doctrine of State equality, while the Senators, by being elected directly three at a time every three years by the people of the State as one electorate, were to be men of impressive character, who would at once lay just stress on the views of the States which they represented and exercise a wise moderating and revising power. In point of fact, the adoption of manhood suffrage had led to the Senate coming to be based on political party organization, and its attitude has never been that of a federal defender of State rights; when under Labour domination it has been energetically opposed to such rights and at other times indifferent; the cases in which State spirit has been shown are minor affairs, such as the determination of the Tasmanian Senators not to have a quarantine station near Hobart in 1910,<sup>1</sup> which induced them to whip up sufficient support to cut out the destination of the appropriation. It may be noted that election of Senators by the Houses

<sup>1</sup> *Parl. Pap.*, 1910, pp. 3286, 3450-8, 3582 f. For the theory, see Quick and Garran, *op. cit.*, pp. 413 ff.

of the State Parliament acting together is permitted, but merely to fill casual vacancies,<sup>1</sup> and even then only until the next general election of the House of Representatives or of Senators.

The principle of population, on the other hand, as in Canada, dominates the Lower House, where, under the growth of the comparative populations, New South Wales has now 28 members, Victoria 20, and Queensland 10, as against the original 26, 23, and 9, while Western Australia and Tasmania remain at 5, the minimum figure, and South Australia at 7, the Northern Territory being given a member without voting power. In calculating population, there are omitted aborigines and members of races excluded from the franchise for the Lower House in the State; this rule strikes at Western Australia and Queensland, which since 1907 (Act No. 22) and 1905 (Act No. 1) have disfranchised Asiatics as well as aborigines.

The Federation may be looked upon from two points of view, a matter which was never possible in the case of Canada, so clearly predominant was the position of the Federal Government, with its sole right of correspondence with the Imperial Government, and its apparent control over the provinces. It might be argued, as many State politicians held, that all that had happened was the creation of a new agency by the States, which was to serve as their representative in certain defined matters. The view of the Commonwealth Government, as accepted and developed by the Imperial Government at and after federation, was that the change was not the mere addition of a new entity to existing bodies; it was the creation of a whole, which embraced the parts and in the process altered and changed their nature. To the outside world, in foreign affairs and in Imperial relations alike, the Commonwealth was to stand for and speak for Australia. The truth, as usual, lay between these extremes, but it is wholly impossible yet to say how the course of judicial interpretation will ultimately lead, for the High Court, as will be seen, does not feel bound to respect its own previous decisions, and changes in personnel may at any time deflect the course of interpretation of the constitution.

The constitution itself gives little direct guidance. It pro-

<sup>1</sup> See *Vardon v. O'Loghlin*, 5 C. L. R. 201; *Parl. Deb.*, 1907, pp. 4393 ff.; *Parl. Pap.*, 1907-8, Nos. 111, 112.

vides indeed, in the preamble, an assertion of the purpose of the colonies to unite in one indissoluble federal Commonwealth under the Crown of Great Britain and Ireland, and it is expressly enacted in the covering Act that the Commonwealth shall be one Colony for the purpose of the *Colonial Boundaries Act*, 1895, but the relation of the Commonwealth to the definition of Colony in the *Interpretation Act*, 1889, and to its mention in other Acts, was left undefined. Nor does the Act throw any direct light on the issue of what is the law, if any, of the Commonwealth. The matter, however, seems clear enough, for it is not complicated by the consideration, which has been noted but never decided by the Privy Council, that in Canada the province of Quebec has French law as its common law. The prerogative of the Crown is in force in Australia, and all that concerns it appertains to the common law of the Commonwealth.<sup>1</sup> This has been recognized in *R. v. Kidman*<sup>2</sup>, when it was attempted to show that it was not within the power of the Commonwealth Parliament to confer upon the High Court original jurisdiction in respect of offences against the common law, the accused being indicted of conspiracy to defraud the Commonwealth. This attempt was repelled, and both the Chief Justice and Isaacs J. were clear that there was a definite common law offence of opposition to the Crown in its Commonwealth, as distinct from a State capacity. This common law the Commonwealth could not enact, though it might recognize its existence by enactment, save, of course, under one or other of its specific powers. It is dubious if, in any other sphere, the common law can be said to appertain to the Commonwealth, just as in the United States it is denied that there is any common law. It is, of course, true that in interpreting cases from the State Courts the High Court will apply the principles of the common law, where not rendered out of place by statute, but that is in respect of the common law of the States. Further, it will interpret Commonwealth statutes and the constitution under the principles of the common rules of interpretation, which, based on English practice, are in force throughout the

<sup>1</sup> Clark, *Australian Const. Law*, pp. 198 ff. Contrast Quick and Garran, *op. cit.*, pp. 785 ff.

<sup>2</sup> (1915) 20 C. L. R. 425. Compare *In re Neagle* (1890), 135 U. S. 1, and Kerr, *Austr. Const.*, pp. 28 ff.

Empire, but it is difficult to hold that there is any common law of elections in the Commonwealth, as was contended in *Chanter v. Blackwood*.<sup>1</sup>

Adopting this construction of Acts by English models, the High Court has on several occasions investigated the position of the Crown in the States as against the Crown in the Commonwealth. The clear rule is that a statute is normally intended to govern the actions of subjects, and, therefore, does not normally admit of interpretation, without express words, as meant to bind the Crown. In the case of the Commonwealth Constitution, however, the purpose of the Act being the distribution of legislative, executive, and judicial authority, the provisions of the Act bind the Crown by necessary implication. This is clear, but the question remains how far a Commonwealth Act may be assumed to bind the Crown when the Crown is not specifically mentioned therein. The issue arose in a concrete form in *The King v. Sutton*,<sup>2</sup> and *Attorney-General of New South Wales v. Collector of Customs*,<sup>3</sup> where the Government of New South Wales asserted that, as representing the Crown, it was entitled to bring in wire netting for its Government sale to farmers, free of duty and exempt from any interference by the customs authorities, on the score that the Commonwealth was forbidden by s. 114 to tax the property of a State, and that the *Customs Act*, 1901, did not apply to the Crown, and, therefore, gave no authority to agents of the Commonwealth to detain property of the Crown, dutiable or otherwise. The High Court ruled that the constitution was binding on the Crown in the States, that it gave to the Commonwealth, by ss. 52 (2), 86 and 90, sole control in all customs matters; and that in matters thus given wholly to the Commonwealth its legislation must be deemed to apply to the peoples and the States impartially, without any reservation for the Crown in the States, which was not, as regards customs matters, the Crown at all. The Crown was no doubt one and indivisible, 'but its power is not one and indivisible';<sup>4</sup> it acts by varying agents with varying authority in different localities, or for different purposes in the same

<sup>1</sup> 1 C. L. R. 129.

<sup>2</sup> (1907) 5 C. L. R. 789. What constitutes importation is discussed in *Canada Sugar Refinery Co. v. The Queen*, [1898] A. C. 735.

<sup>3</sup> (1907) 5 C. L. R. 818.

<sup>4</sup> Isaacs J., 5 C. L. R., at p. 809.

locality'. Customs was a matter concerning the Crown in the Commonwealth; the *Customs Act* did not bind the Crown there, unless expressly enacted, but it bound the Crown in the States, which were the Crown in a different capacity. The point as to prohibition of taxing the property of the State was a much more difficult one; the Court was not prepared to adopt the Privy Council's attitude in the case of Canada, and to hold that the prohibition in s. 114 must be read subject to the taxing power.<sup>1</sup> But Isaacs J. was prepared to rule that the term 'tax' in s. 114 did not apply to customs duties, and the rest of the Court found a way out by holding that customs duties were a tax on importation, not on property. The case might, of course, have been disposed of on the narrow but sensible ground that there are two aspects of a State, governmental and commercial, and that the prohibition of s. 114 referred only to the State in its former capacity.

The same doctrine is expressed in *Amalgamated Society of Engineers v. Adelaide Steamship Co., Ltd.*,<sup>2</sup> where the question at issue was whether the legislation of the Commonwealth as to conciliation and arbitration was to be deemed to be binding on the Crown in the States. The majority of the Court held that

the Crown is ubiquitous and indivisible in the King's Dominions. Though the Crown is one and indivisible throughout the Empire, its legislative, executive, and judicial power is exercisable by different agents in different localities, or in respect of different purposes in the same locality, in accordance with the common law or the statute law there binding the Crown.<sup>3</sup> . . . The Commonwealth Constitution, as it exists for the time being, dealing expressly with sovereign functions of the Crown in its relation to Commonwealth and to States, necessarily so far binds the Crown, and laws validly made by authority of the Constitution bind, so far as they purport to do so, the people of every State considered as individuals or as political organizations called States—in other words, bind both Crown and subjects . . . the extent to which the Crown, considered in relation to the Empire, or to the Commonwealth, or to the States, is bound

<sup>1</sup> *City of Montreal v. A.-G. for Canada*, [1923] A. C. 136.

<sup>2</sup> (1920) 28 C. L. R. 129; *Pirrie v. McFarlane*, 36 C. L. R. 170.

<sup>3</sup> Cf. *Williams v. Howarth*, [1905] A. C. 551; *Municipalities' Case* (1919), 26 C. L. R. 508, 533; *Theodore v. Duncan*, [1919] A. C. 696, 706; *Commonwealth v. Zachariassen*, 27 C. L. R. 552; *Parl. Pap.*, 1907-8, No. 128; *Dominion of Canada v. Province of Ontario*, [1910] A. C. 637.

by any law within the granted authority of the Parliament, depends on the indication which the law gives of intention to bind the Crown.

This is to all appearance sound law ; what it means is that within the ambit of its authority, any Colonial Legislature can bind the Crown in any of its aspects ; a provincial Act in Canada can take away the priority of Imperial or Dominion or provincial claims on a bank in the province. Nor is there anything inconsistent in the other decided cases. In *Roberts v. Ahern*<sup>1</sup> what was decided was that under the Victorian *Police Offences Act*, 1890, the Crown in its colonial capacity was not bound, and so the Crown in the Commonwealth would not be bound. So in *The Commonwealth v. State of New South Wales*<sup>2</sup> it was ruled that a memorandum of transfer to the Commonwealth of land acquired for public purposes need not be stamped under the New South Wales *Stamp Duty Act*, 1898, inasmuch as the Act was not intended to bind the Crown when it was passed, and so would not apply to the Crown in the Commonwealth. But the further suggestion there made, that the Act, if it had been extended to the Crown in the Commonwealth, would not have been valid, must be regarded as merely an *obiter dictum*, and overruled by the later decision in the *Engineers*'<sup>3</sup> case. The narrower view adopted there is in harmony with the decision in *Broken Hill Associated Smelters Proprietary Ltd. v. Collector of Imposts for Victoria*<sup>4</sup> when it was ruled that the Victorian *Stamps Act*, 1915, did not apply to contracts for marine insurance effected in England with the British Government, the Crown not being expressly mentioned in the Act. Nor is there any ultimate disagreement between this view—though there is some of emphasis—and that expressed in *Municipal Council of Sydney v. The Commonwealth*,<sup>5</sup> when stress was laid on the different aspects of the Crown as constituting distinct juristic persons.

In order to emphasize the aspect of the Commonwealth as presenting Australia as a unit in Imperial relations, it was proposed in the draft constitution of 1891 definitely to provide that the Governor-General should be the channel through which all communications should pass from the Governors of the States

<sup>1</sup> (1903) 1 C. L. R. 406.

<sup>2</sup> (1906) 3 C. L. R. 807.

<sup>3</sup> 28 C. L. R. 129 ; 36 C. L. R. 170.

<sup>4</sup> (1918) 25 C. L. R. 61.

<sup>5</sup> (1904) 1 C. L. R. 208. Cf. *Gauthier v. The King* 56 S. C. R. 176.

to the Imperial Government, and that the signification of the Crown's pleasure on Acts should be conveyed through the same medium. Sir S. Griffith, Sir H. Parkes, and Sir R. Baker assented to this view,<sup>1</sup> but it was definitely rejected at the Adelaide meeting when Mr. Deakin moved its acceptance ;<sup>2</sup> Sir E. Braddon and Mr. Kingston definitely declaring against it as an undue derogation from the rights of the States. The matter, therefore, was left undefined, and only in 1902 did the matter come to a head, when the Netherlands Government made representations to the Imperial Government regarding the failure of the Government of South Australia to arrest the crew of the Dutch vessel *Vondel*, in accordance with the terms of the existing Anglo-Dutch treaty regarding the treatment of merchant seamen. The Secretary of State asked the Governor-General to report on the incident, thus assuming that as a matter of external affairs, which was included in the legislative authority of the Commonwealth, it was proper to approach that Government on the issue. The Government of South Australia, however, declined to accept this view, insisting that the Governor was the proper channel of communication, and the Secretary of State was perforce obliged to ask the officer administering to report as to the incident, and to supply a statement of his minister's views on the proper channel of communication in such cases.<sup>3</sup> The Commonwealth Government, on its part, mooted the theory that the application for the arrest of the sailors should have been addressed by the Consul-General to the Governor-General, and not by the local Consul to the Governor, and proposed to appoint a Royal Commission to investigate the episode. Oil was thrown on the troubled waters by Mr. Chamberlain, who deprecated any action regarding Consuls without full investigation. The South Australian Government argued effectively for their right of action. They admitted that in respect of the transferred departments, and any matters on which the Commonwealth had the power to legislate and had legislated, it might well be held that the only proper channel of communication was the Commonwealth Government. But, for the time being, even if the power to legislate as to external affairs were sufficient to enable the

<sup>1</sup> *Convention Debates*, 1891, pp. 851 ff.

<sup>2</sup> *Adelaide Debates*, p. 1177.

<sup>3</sup> *Parl. Pap.*, Cd. 1587.

Commonwealth to legislate to secure observation of Imperial treaties, and the punishment of officials who violated such treaties, still, no such legislation had been passed. Nor did the fact that the High Court was granted original jurisdiction in matters arising under any treaty, or affecting consuls, give that Court exclusive powers for the time being, the State Courts still retaining jurisdiction pending federal legislation. In the circumstances, as South Australia alone could act, it would be improper to bring in the Commonwealth at all. The Commonwealth, on the other hand, insisted on its legislative, and therefore executive, authority regarding external affairs, trade and commerce with foreign countries, and navigation and shipping.<sup>1</sup>

Mr. Chamberlain's views of 25 November 1902,<sup>2</sup> were marked by the wide view he took of the nature of the Commonwealth, as created to represent Australia for the purpose of external affairs, the question of how an obligation of the Commonwealth was to be made effective locally, being really separable from and not to be confused with the essential fact that the obligation was that of Australia. He insisted that it was not relevant to the issue to argue that the powers were merely in the hands of the State; responsibility towards every foreign nation rested immediately and ultimately with the Imperial Government, but the means of carrying out these obligations lay in the hands of many officials, Dominion or provincial, Commonwealth or State, over whom the Imperial Government had no direct control, and who could be dealt with, if they failed in duty, only by their own Governments. This delegation was made possible merely by the doctrine that obligations were accepted as binding by all parts of the Empire equally. It did not alter the fact that the immediate responsibility as regards the carrying out of the treaty obligations of the Australian people rested with the Commonwealth, as followed essentially from the intention of the constitution to create a single federal Commonwealth. The Federal Government, in a minute of the Attorney-General of 12 November 1902, and a dispatch of the Prime Minister of 21 November<sup>3</sup> energetically supported the same view, but the Acting Premier of the State, on 13 February 1903,<sup>4</sup> made a spirited and effective reply. Mr. Chamberlain on 15 April<sup>5</sup>

<sup>1</sup> Ibid., pp. 10, 11.

<sup>3</sup> Ibid., pp. 15-22.

<sup>2</sup> Ibid., pp. 12-15.

<sup>4</sup> Ibid., pp. 23-5.

<sup>5</sup> Ibid., p. 25.



reiterated his point of view, asserting that foreign nations were now entitled to look, through the Imperial Government, to the Commonwealth for redress in respect of any wrong suffered by them in respect of Australia, just as they must look to the United States to redress wrongs committed in Louisiana. The contentions of South Australia would reduce the constitution to one of a federal league. Communications with the States were in order only when the Crown, as part of the State constitution, was concerned, with the Commonwealth when the Crown was concerned, as the central authority of the aggregate of communities composing the Empire.

It may be admitted that Mr. Chamberlain's arguments are far from being conclusive, and that the reasoning is imperfect. As far as foreign countries were concerned it is perfectly clear that, until the formation of the League of Nations, the Commonwealth had no meaning for them at all; it was merely part of the British Empire, which for diplomatic purposes was represented by the Cabinet of St. James, and it was ludicrous to talk of them looking to the Commonwealth for redress. As far as they were concerned, they looked to the Imperial Government only. The attempt to differentiate between two kinds of communication, according to the nature or aspect of the Crown involved, simply begged the question, for the whole point was the ambit of the Crown in a State. Was the State Government responsible to the Imperial Government for the carrying out of treaty obligations? Or was it responsible to the Commonwealth Government, and was only that Government directly responsible to the Imperial Government? The difficulty was that the Federation Act did not say what the result of federation meant, and that, therefore, it was merely a matter of opinion. But, clearly, it was very difficult to assert that the Commonwealth was responsible where it had no power to enforce its responsibility. In the Dominion, no doubt could ever arise as to the responsibility. Section 132 of the *British North America Act*, by giving the Dominion plenary power to fulfil all treaty obligations, gave authority over the provinces. But unless external affairs covered such a power—and that was as little probable then as it is now—the position of Mr. Chamberlain meant that the Commonwealth was to bear a responsibility which she could not enforce. The Commonwealth fortunately

realized its position, and by tactful dealings evaded pressing the matter to a really grave issue.

The Imperial Government was, of course, unable to enforce directly acceptance of Mr. Chamberlain's dicta, but it did its best to secure obedience. Thus, when the Queensland Government with every justification asked for representations to be made to the United States Government, regarding the ill treatment of a British subject from Queensland, Mr. Benjamin, at San Francisco, the Secretary of State insisted on referring the matter to the Commonwealth Government for its endorsement, on the same principle that it must be the Commonwealth which acted in any case of relations with foreign powers.<sup>1</sup> Similarly, when the New South Wales Government asked that steps be taken to secure redress for Mr. Weigall's wrongs in Manchuria, the Commonwealth was brought into the matter by the Secretary of State. But the States could not be ignored in their turn, when it came to the question of matters such as the landing of foreign sailors from warships. Doubtless the Commonwealth had a clear *locus standi* as the authority to deal with defence as well as foreign affairs, but the States claimed their full police power, and the matter was arranged by mutual accommodation and not Commonwealth dictation at the Brisbane Conference of 1907, while subsequent modifications made were distinctly in favour of State authority.<sup>2</sup>

From a more domestic point of view the matter was made a subject of dispute in regard to invitations to the Colonial Conference of 1907. No invitations had been sent to the Conference of 1902 to the States, and even invitations to the Coronation had been sent through the Governor-General, a most improper step, resulting in the dignified and proper refusal of the Premiers to attend.<sup>3</sup> When it was apparent that invitations to the Conference of 1907<sup>4</sup> were not to be issued, representations were made by South Australia and by New South Wales on behalf of the other States. The argument of South Australia was

<sup>1</sup> Cf. the discussion at the Premiers' Conference at Brisbane in 1907; *Victoria Parl. Pap.*, 1907, No. 23, pp. 37-47.

<sup>2</sup> *Ibid.*, pp. 271 ff.; *Commonwealth Stat. Rules*, No. 31 of 1909; No. 29 of 1910; No. 29 of 1911.

<sup>3</sup> *Daily Chronicle*, 25 Jan. 1902. In 1910 the invitations went through the Governors.

<sup>4</sup> *Parl. Pap.*, Cd. 3337, 3340, 3524, pp. 92-4.

effective ; it pointed out that the States had a different status from Canadian provinces ; they had direct relations with the Crown ; moreover, they retained the most important functions of government, while the Commonwealth might not improperly be deemed to be a common agency for the management of the customs and excise, postal and defence departments of the States. Even, however, in regard to issues on which the Commonwealth had power, such as customs, posts, and telegraphs, the matters of discussion were of paramount importance to the States. State co-operation in discussion was essential in regard to such issues as the proposed creation of an Imperial Council, of an Imperial Court of Appeal, immigration and preferential tariffs. The summoning of Natal or Newfoundland to the Conference, while omitting the States, was invidious. The Prime Minister of the Commonwealth naturally did not concur in these views, and the Secretary of State on 16 February 1907 gave a reasoned refusal, which may fairly be said to have contained better arguments than the views of 1902-3. It was pointed out that the Commonwealth could not be described as an agent of the States ; it derived its authority from exactly the same source as the States, legally from the Imperial Parliament, politically from the will of the people. The States had surrendered a great measure of their power as compared with Natal ; customs and excise, posts and telegraphs, defence, immigration, naturalization, oversea trade and commerce, had all become subject to the federal power. The Conference was held, in the main, for discussing matters which fell within the exclusive sphere of the Commonwealth, and it would be impossible, without ignoring the fundamental constitution of the Commonwealth and the purpose of the Conference, to invite the Premiers of the States, though in all matters concerning the States they would be duly consulted. The States were not at all convinced, but they were powerless to do anything, and they were not invited to the Conference of 1911,<sup>1</sup> and naturally still less to the subsequent conferences held during the war or after it. The recognition that the States must be consulted in all matters affecting them meant, of course, that matters such as immigration were incapable of really effective treatment at any conference, and all that could be done was to hope—as proved

<sup>1</sup> *Parl. Pap.*, Cd. 5273, pp. 12-14.

ultimately to be the case—that force of circumstances would dictate to the Commonwealth and the States some system of co-operation in regard to this issue. The matter was rendered more effectively under control by the use of the Commonwealth Government as an intermediary in respect of the new loan policy of £34,000,000 in 1925–6. The suspicions aroused, however, by the failure to invite the States to the Conference of 1907 are clearly shown by the fact that the decision of the Secretary of State to create a Conference Secretariat—of the most shadowy kind—in the Colonial Office elicited from New South Wales an attack on the score of some fancied intention to interfere in the self-government of the States. The disclaimer given was so categorical and emphatic as to dismiss that fear.

While it is possible for the Imperial Government to insist on referring to the Commonwealth Government matters arising in the States which may affect the Commonwealth, it is clearly impossible to forbid the Governor of a State forwarding direct to the Secretary of State the views of ministers on any issue of a federal kind,<sup>1</sup> and it is only through the personal control which the Secretary of State has over Governors that he can be made to send copies of his dispatches to the Governor-General for his personal information, and that of his ministers, if in his opinion the matters at issue are of federal interest. Copies of the Secretary of State's dispatches can, of course, be sent to the Governor-General at his discretion, but the matter is obviously one in which tact must be exercised, and the Secretary of State has the simple remedy, in any instance in which he deems that a State dispatch should be communicated to the Governor-General, of telegraphing instructions that this should be done, though of course this cannot be applied to confidential communications without the assent of ministers.

The question of honours has in this regard presented serious difficulties, as the claim was early made that the recommendations made by ministers or the Prime Minister—as is usually the form adopted, though the honour may be the outcome of a

<sup>1</sup> The protests of the Premier of Victoria on 24 Nov. 1926 against an alleged decision of the Imperial Conference of 1926 to cut off direct communications with the Imperial Government was a complete misunderstanding ; Part VIII, chap. iii, § 8.

Cabinet agreement—should not be seen by the Governor-General, and still less by his ministers. There is much force in this position, for clearly it is straining the imagination excessively to hold that the Commonwealth Government, or even the Governor-General, has any *locus standi* with regard to honours recommended in respect of services to the States. But there is sufficient ground to justify the compromise that the recommendations should go to the Governor-General personally, though clearly he could not be made the necessary channel of communication. The justification for his action is simple ; the number of honours to be allocated to the Commonwealth must always be limited, and the Governor-General, as an Imperial officer of the highest standing in the Commonwealth, is the best adviser whom the Secretary of State can have, as to the comparative merits of the various names which the States desire to submit as worthy of honorary distinction. But this clearly involves the elimination of Commonwealth ministers, who could hardly constitutionally be allowed to have any voice in an issue of this sort, without giving good grounds for the supposition that they were indirectly being allowed to intervene in the affairs of the States. It might, it is clear, quite conceivably affect the attitude of a State Premier in some issue with the Commonwealth, if he knew that the Prime Minister had power to prevent his name being considered for the coveted distinction of the O.B.E. !

There arises a serious complication in the Commonwealth between the objection of certain States, e. g. South Australia, to the grant of honorary distinctions to Australians resident in the State, and the right of the Commonwealth to recommend South Australians for recognition for services to the Commonwealth. There is no easy solution, for a man in the Commonwealth may be regarded from the point of view of honours in three aspects, as a subject of the Empire, of the Commonwealth, and of the State, and all three governments have a constitutional right to suggest an honour for services rendered in any of these capacities. The analogy of the Canadian resolution of 1919 suggests irresistibly that it is the territory of a man's permanent residence which should ultimately be allowed to pronounce on the issue whether an honorary distinction should be awarded. Even for Imperial services, as

matters stand, an honour is not properly conferred on a resident of Canada, save with the assent of the Dominion Government, and an analogous rule might be applied in Australia pending the time when the absurdity of these distinctions strikes the minds of people everywhere as strongly as it has done those of Canada and the Union of South Africa ; possibly, some effect may in the long run be produced by contemplation of the admitted fact that honours have been sold in England, and that an Act to punish touts has been passed.<sup>1</sup>

In other matters also it has been found necessary to recognize that the relations of the States and the Commonwealth differ essentially from those of the provinces and the Dominion in Canada. Thus, in the case of the miscellaneous conferences on all sorts of topics, which were not expected to result in treaties, and for which delegates were not accredited in treaty form—frequent before 1914, but now largely superseded by action under the labour clauses of the League of Nations Covenant, invitations to attend were sent direct to the States, and the States are asked to accord recognition to consular officers ; similar requests are, of course, made directly to the Commonwealth also, but the claim cannot successfully be made that the Commonwealth should serve in these matters as the intermediary, since the States could effectively retort by refusing to act, if approached through the Commonwealth. Moreover, in harmony with the assurances given by the Secretary of State in 1907, in the case of conferences of an Imperial character, which concern matters within the activities of the States, they are duly invited direct to send representatives.<sup>2</sup>

The somewhat confused condition of relations is reflected in the decisions of the High Court, which establish what is already obvious, that the Constitution is far from being a complete and logical instrument. The High Court has been willing to use the term 'sovereign' of both the Commonwealth and the States in their own spheres, though it has been frankly admitted that the term 'sovereign' is here used in a slightly inaccurate sense, as both the Commonwealth and the States are in the ultimate issue merely creations of the one fully sovereign Parliament, that of the United Kingdom. It has, however, rightly been

<sup>1</sup> *Honours (Prevention of Abuses) Act*, 1925 (15 & 16 Geo. V. c. 72).

<sup>2</sup> e.g. the Surveyors' Conference of 1911 ; Cd. 5273, pp. 124 ff.

said that they may without objection be described as sovereign,<sup>1</sup> with respect to the matters committed to them under the constitution, and, when this is admitted, it is clear that it is difficult to press for the subordination of the States to the Commonwealth, except strictly in the sphere of the paramount authority of the Commonwealth. Further, in *McKelvey v. Meagher*<sup>2</sup> it was admitted by the High Court that the Governor of the State is the proper person to act, under the *Fugitive Offenders Act*, 1881, because the term 'Governor of a Colony' in an Imperial Act refers to the Governor of such a Colony as can enact legislation on the matter at issue, so that, if in any case the Commonwealth Parliament is not capable of legislating, then it is not a central legislature within the meaning of the *Interpretation Act*, 1889, or any similar definition; O'Connor J. denied definitely that the Commonwealth could legislate on such a topic, criminal law appertaining to the States.

Unhappily, the mere power to legislate as to external affairs, given in the constitution, still remains undefined by the High Court. Could it be stretched, as undoubtedly that of Canada under s. 132 of the constitution could be used, to allow the Commonwealth to legislate beyond the federal sphere? The answer seems indubitably to be in the negative. The Acts claimed to have been passed under it are of a different kind; they include the *Extradition Act*, 1903—which might be justified on another score as dealing with the influx of criminals; the *High Commissioner Act*, 1909; the *Nauru Island Agreement Act*, 1920; and the *Treaties of Washington Act*, 1922. These are all matters which clearly fall within Commonwealth, not State authority, and it appears certain that, where any treaty touches on matters not placed within the ambit of Commonwealth authority by some specific power, the States must legislate if any action is to result.<sup>3</sup> In point of fact, there are several cases on record of such actions, and, as in Canada, the acceptance by the Commonwealth of the recommendations of the labour

<sup>1</sup> Cf. *D'Emden v. Pedder* (1904), 1 C. L. R. 91, 105, with *Commonwealth v. New South Wales* (1923), 23 C. L. R. 200, 210. <sup>2</sup> (1906) 4 C. L. R. 265.

<sup>3</sup> e.g. to enable legislation as to air navigation by the Commonwealth (No. 50 of 1920), Acts were passed by the States, Victoria No. 3108; South Australia No. 1469; Tasmania No. 42 of 1920; Queensland No. 30 of 1921; see *Gazette*, 1921, p. 480.

organization under the League of Nations is essentially in the form of an obligation to submit the proposals for the acceptance of the States, just as in Canada reference is made to the provinces.

The independence of the States is also seen in the refusal of the Commonwealth High Court to permit the issue of *mandamus* to the Governor of a State, to hold an election for filling a vacancy in the office of Senator,<sup>1</sup> or of a *mandamus* to a Governor in Council<sup>2</sup> to hear and determine a petition of a convict for release, under the terms of an Act. These are political matters which evade judicial control as much in the case of the States as of the Commonwealth itself.

### § 3. *The Executive Power of the Commonwealth*

The executive power of the Commonwealth is very large, and extends to the maintenance of its constitution and its laws.<sup>3</sup> In addition to the powers conferred by Commonwealth Acts, the Executive has authority sole and exclusive over the transferred departments.

By s. 61 the executive power is vested in the Queen, and is exercisable by the Governor-General as the Queen's representative, a statement which appears to exclude the possibility of exercise by the Crown in person, though this is expressly permitted by the constitution of the Union; in Canada<sup>4</sup> it is doubtful whether the Crown could administer, save through the Governor-General. Section 2 provides that the Governor-General shall have and may exercise in the Commonwealth, during the Queen's pleasure, but subject to the constitution, such powers and functions of the Queen as her Majesty may be pleased to assign to him. This provision is not altogether free from ambiguity, but it is legitimate to suppose that it refers to matters outside the ambit of the executive government of the Commonwealth. Thus it covers what is not certainly included in the executive power, the prerogative of pardon, which is expressly

<sup>1</sup> *The King v. The Governor of the State of South Australia* (1907), 4 C. L. R. 1497.

<sup>2</sup> *Horwitz v. Connor* (1908), 6 C. L. R. 38.

<sup>3</sup> Quick and Garran, *Const. of Commonwealth*, pp. 390 f.; Clark, *Austr. Const. Law*, pp. 52-70; Kerr, *Austr. Const.*, pp. 217 ff.; Higinbotham C.J., in *Toy v. Musgrove*, 14 V. L. R. 349, 380.

<sup>4</sup> Clement, *Canad. Const.*, pp. 252 f.



delegated to him, and any international prerogatives, such as the prerogative to order exercise of the seizure of neutral vessels, or of annexing territory, which may be delegated by the Crown, and any delegation of the prerogative of honour, for instance, power as regards the grant of the use of the royal arms, or the regulation of precedence. It may be added that, though the constitution vests the Executive Government in the Governor-General, the better opinion certainly is that the prerogative could have created the office, if the constitution had been silent, and the inclusion of the mention of the executive power was due largely to the federal character of the constitution, with its insistence on stressing the divisions of power as legislative, executive, and judicial. It has been definitely held by the High Court<sup>1</sup> that, if any war prerogative were to be used in Australia, it should be executed by the Governor-General, but, as the case at issue was an attempt to justify action by a State, it was not necessary for the purpose of the case to decide whether, without express delegation, the prerogative in war matters was held in any degree to be inherent in the executive power, in view of the authority of the Commonwealth in respect of defence. It must, however, be said that there is no authority for the view<sup>2</sup> that the executive power in a federation is any more full than, say, in New Zealand or the Union, though it is exercised in respect of a greater area, and, therefore, *ipso facto* is more important in magnitude.

Under the constitution the departments of customs and excise passed to the Commonwealth on 1 January 1901, upon its birth; those of posts, telegraphs and telephones, and of defence passed over on 1 March. Quarantine was first regulated in 1908<sup>3</sup> by the Commonwealth Parliament; under this and amending legislation the quarantine of vessels, persons, goods, and human diseases is under the executive control of the Commonwealth, except in Tasmania, where a State official is used, and payment made to the State for his services. As regards the control of inter-State movements of plants and animals, the powers of the States are still permitted to be exercised, despite

<sup>1</sup> *Joseph v. Colonial Treasurer of New South Wales* (1918), 25 C. L. R. 32.

<sup>2</sup> Clark, *op. cit.*, p. 63; Quick and Garran, *op. cit.*, p. 390.

<sup>3</sup> No. 3 of 1908; No. 15 of 1912; No. 42 of 1915; No. 47 of 1920; No. 30 of 1924.

the wide authority taken in the Commonwealth legislation. Lighthouses, beacons, buoys and lightships were not dealt with until the question of the Navigation Bill had been taken up, and legislation was first passed in 1911.<sup>1</sup>

The executive power in the Commonwealth is little affected by considerations of the federal character of the Commonwealth. But it has been held that the power of making regulations, when given to the Executive, is not available to enable it to defeat the probable decision of the High Court in a partly heard case, standing over for judgement, by altering the law with retrospective effect.<sup>2</sup> A similar point arose, but was not decided, in the English case of *Art O'Brien*.<sup>3</sup> It has also been held, probably differing herein in the latter point from the law accepted in other parts of the Empire, that not only has the Executive no power to bind the Crown to pay money without specific appropriation being requisite by Parliament,<sup>4</sup> but also that even an appropriation *ex post facto* is inadequate to validate an agreement entered into by the Executive without Parliamentary authority.<sup>5</sup> The rule laid down by the Privy Council<sup>6</sup> is clear; any contract made by the Crown through its agents is subject to the well-understood condition that funds will be provided by Parliament to meet the proposed contract; if this is not done, there arises no liability on the Crown, and a petition of right will not lie. Any contractor with the Crown, therefore, acts on his own peril of Parliamentary failure to approve payment.

#### § 4. *The Legislative Power of the Commonwealth and the States*

The legislative powers of the Commonwealth and the States are set out in ss. 106 and 107, asserting the continuation in the main of the powers of the States, and in the other sections also given below, which define the authority of the Commonwealth. To the powers of the Commonwealth fall to be added its authority regarding the constitution of the legislature, financial

<sup>1</sup> No. 14 of 1911; No. 17 of 1915; No. 6 of 1919.

<sup>2</sup> *Sendall v. Federal Commissioner*, 12 C. L. R. 664; cf. *Federated Engine-Drivers' and Firemen's Assoc. v. Broken Hill Prop. Co.* (1913), 16 C. L. R. 245.

<sup>3</sup> *Secretary of State for Home Affairs v. O'Brien*, [1923] A. C. 603.

<sup>4</sup> *The Commonwealth v. Colonial Combining, &c., Co.* (1922), 31 C. L. R. 421.

<sup>5</sup> *The Commonwealth v. Colonial Ammunition Co.* (1923), 34 C. L. R. 198.

<sup>6</sup> *Commercial Cable Co. v. A.-G. for Newfoundland*, [1912] A. C. 820.

matters, judicial questions, and the appointment of federal officers under s. 67. The laws of the Commonwealth have an unusual extra-territorial effect, being in force on all ships, the King's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth. The exception applies, it is clear, only to the Imperial naval forces not under Commonwealth control; vessels under Commonwealth control fall under the defence power, and the laws of the Commonwealth apply to them. As has been seen, the effect of this provision, though limited in operation to ships which begin and end their activities in the Commonwealth,<sup>1</sup> is to subject them to all the laws of the Commonwealth.

106. The constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the constitution of the State.

107. Every power of the Parliament of a Colony which has become or becomes a State shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth, or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

108. Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.

109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

112. After uniform duties of customs have been imposed, a State may levy on imports or exports, or on goods passing into or out of the State, such charges as may be necessary for executing the inspection laws of the State; but the net produce of all charges so

<sup>1</sup> *Commonwealth of Australia Constitution Bill*, pp. 142, 150; *Parl. Deb.*, 1904, pp. 2069 ff.; *Ex parte Oesselmann* (1902), 2 S. R. (N. S. W.) 438; *Merchant Service Guild of Australasia v. Archibald Currie & Co. Prop. Ltd.* (1908), 5 C. L. R. 737; above, Part III, chap. ii.

levied shall be for the use of the Commonwealth ; and any such inspection laws may be annulled by the Parliament of the Commonwealth.

113. All fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the State as if such liquids had been produced in the State.

114. A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State.

115. A State shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts.

116. The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.<sup>1</sup>

117. A subject of the Queen resident in any State shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

119. The Commonwealth shall protect every State against invasion, and, on the application of the Executive Government of the State, against domestic violence.

#### PART V. POWERS OF THE PARLIAMENT

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to :

- (i) Trade and commerce with other countries, and among the States ;<sup>2</sup>
- (ii) Taxation ; but so as not to discriminate between States or parts of States ;
- (iii) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth ;
- (iv) Borrowing money on the public credit of the Commonwealth ;
- (v) Postal, telegraphic, telephonic, and other like services ;<sup>3</sup>

<sup>1</sup> This was due to Mr. Higgins's fear of sacerdotalism ; Quick and Garrahan, *op. cit.*, pp. 951-3.

<sup>2</sup> Including under s. 98 navigation and shipping and State railways.

<sup>3</sup> *Commonwealth v. Progress Advertising Co.*, 10 C. L. R. 457.

- (vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth ;
- (vii) Lighthouses, lightships, beacons and buoys ;
- (viii) Astronomical and meteorological observations ; <sup>1</sup>
- (ix) Quarantine ;
- (x) Fisheries in Australian waters beyond territorial limits ; <sup>2</sup>
- (xi) Census and statistics ;
- (xii) Currency, coinage, and legal tender ;
- (xiii) Banking, other than State banking ; also State banking extending beyond the limits of the State concerned ; the incorporation of Banks, and the issue of paper money ; <sup>3</sup>
- (xiv) Insurance, other than State insurance ; also State insurance extending beyond the limits of the State concerned ;
- (xv) Weights and measures ;
- (xvi) Bills of exchange and promissory notes ;
- (xvii) Bankruptcy and insolvency ;
- (xviii) Copyrights, patents of inventions and designs, and trade marks ;
- (xix) Naturalization and aliens ; <sup>4</sup>
- (xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth ;
- (xxi) Marriage ; <sup>5</sup>
- (xxii) Divorce and matrimonial causes ; and in relation thereto, parental rights, and the custody and guardianship of infants ;
- (xxiii) Invalid and old age pensions ;
- (xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgements of the Courts of the States ;
- (xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States ;
- (xxvi) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws ;
- (xxvii) Immigration and emigration ;
- (xxviii) The influx of criminals ;

<sup>1</sup> *Meteorology Act*, 1906, No. 3.

<sup>2</sup> Cf. Federal Council Acts, 51 Vict. No. 1 ; 52 Vict. No. 1.

<sup>3</sup> Cf. *Bank Notes Tax Act*, 1910, No. 14.

<sup>4</sup> This may cover in part the *Pacific Island Labourers Acts*, 1901-6 (No. 16 and No. 22). Cf. (xxvii) and (xxx) ; *Robtelmes v. Brennan* (1906), 4 C. L. R. 395.

<sup>5</sup> *Matrimonial Causes (Expeditionary Forces) Act*, 1919, No. 15.

- (xxix) External affairs ; <sup>1</sup>
- (xxx) The relations of the Commonwealth with the islands of the Pacific ;
- (xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws ; <sup>2</sup>
- (xxxii) The control of railways with respect to transport for the naval and military purposes of the Commonwealth ;
- (xxxiii) The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State.
- (xxxiv) Railway construction and extension in any State with the consent of that State ; <sup>3</sup>
- (xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State ; <sup>4</sup>
- (xxxvi) Matters in respect of which this Constitution makes provision until Parliament otherwise provides ;
- (xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law ;
- (xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia ; <sup>5</sup>
- (xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the federal judicature, or in any department or officer of the Commonwealth.

<sup>1</sup> *Extradition Act*, 1903, No. 12 ; *High Commissioner Act*, 1909, No. 22 ; *Nauru Island Agreement Act*, 1919, No. 8 ; *Treaties of Washington Act*, 1922, No. 4. The Nauru Island Act falls also under (xxx). Cf. *McKelvey v. Meagher* (1907), 4 C. L. R. 265, 278.

<sup>2</sup> See *Lands Acquisition Act*, 1906-16 ; s. 20 is invalid ; *The Commonwealth v. New South Wales* (1923), 33 C. L. R. 1.

<sup>3</sup> See Act No. 25 of 1910 ; No. 4 of 1907 ; No. 7 of 1911 ; No. 3 of 1912 ; No. 31 of 1917 ; No. 4 of 1918 ; No. 36 of 1920 ; No. 11 of 1923 ; No. 54 of 1924 ; No. 11 of 1925.

<sup>4</sup> *Commonwealth Conciliation and Arbitration Act*, 1904-21.

<sup>5</sup> This gives no power to alter Imperial Acts.

52. The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth, with respect to :

- (i) The seat of Government of the Commonwealth,<sup>1</sup> and all places acquired by the Commonwealth for public purposes ;<sup>2</sup>
- (ii) Matters relating to any department of the public service, the control of which is by this Constitution transferred to the Executive Government of the Commonwealth ;
- (iii) Other matters declared by this Constitution to be within the exclusive power of the Parliament.

69. On a date or dates to be proclaimed by the Governor-General after the establishment of the Commonwealth the following departments of the public service in each State shall become transferred to the Commonwealth : posts, telegraphs, and telephones ; naval and military defence ; lighthouses, lightships, beacons, and buoys ; quarantine. But the departments of customs and of excise in each State shall become transferred to the Commonwealth on its establishment.

Of the powers given to the Commonwealth Parliament under s. 51 none are stated to be exclusive, but in some cases the power is one which did not exist before the Commonwealth came into being, and therefore necessarily cannot be shared by the States. This applies to (iv), borrowing money on the credit of the Commonwealth ; to (vi), taken in conjunction with s. 114, naval and military defence ; to (x), fisheries beyond territorial limits, a power of the old Federal Council ; to (xii), taken with s. 115, as to currency, coinage, and legal tender ; to (xxiv) and (xxv), recognition of process, laws, &c., and to all the heads from (xxxi) on. By ss. 52 and 69 the Commonwealth has exclusive power as to the seat of government and the departments of posts, defence, lighthouses, &c., and quarantine ; but as to matters other than the departments themselves the State Parliaments can legislate under s. 108, until the Commonwealth passes legislation occupying the field ; quarantine has long been left in part in State control. Exclusive power is also possessed against the States, in respect of surrendered territory (s. 111) and territory placed by the Crown under Commonwealth control (s. 122).<sup>3</sup>

<sup>1</sup> *Seat of Government (Administration) Act*, 1924, No. 8.

<sup>2</sup> Cf. *Rex v. Bamford* (1901), 1 S. R. (N.S.W.) 337.

<sup>3</sup> *Norfolk Island Act*, 1913, No. 15 ; *New Guinea Act*, 1920, No. 25.

In some cases there coexists full power of co-ordinate legislation ; thus taxation (ii) is open to both,<sup>1</sup> there being no such narrow restriction as in the case of Canada, where the provinces have only powers of direct taxation, though the States are debarred from levying customs and excise. Astronomical and meteorological observations (viii) are common ground, but New South Wales insists that the Commonwealth should exercise the power and find the funds. Legislation as to census and statistics (xi), foreign and other corporations (xx), and invalid and old age pensions might be concurrent, but the States have naturally taken to a considerable extent advantage of the Commonwealth system to drop their own, save for special cases. In other instances, as under xxxiii, xxxiv, xxxvii, and xxxviii, legislation by the State is necessary as part of the scheme of the federal authority to legislate. In other cases Commonwealth legislation must practically supersede all State legislation ; thus in regard to bills of exchange and promissory notes (xvi) ; copyright, patents, and trade marks (xviii) ; and naturalization (xix). In these cases the legislation passed contained clauses providing that the State Acts shall not be applicable,<sup>2</sup> a provision due to acceptance of the ruling in the case of Canada that the Dominion Parliament cannot repeal a provincial statute, but can only render it inapplicable by repugnancy, whence it has been deduced that the repeal of a Commonwealth Act brings the State Acts automatically back into operation. In some cases, where Commonwealth power is predominantly active, there may be room for supplementary State action, as in the case of immigration and emigration (xxvii) and the influx of criminals (xxviii), several of the States having deemed it desirable to legislate with a view to preventing the entry into their territory of criminals from other parts of Australia. Similarly, it is clearly open to the States to make laws differentially affecting persons of any specified race, which may exist side by side with Commonwealth legislation on the topic applying more generally. As regards external trade, though the States have lost their old right to

<sup>1</sup> Cf. *Municipal Council of Sydney v. The Commonwealth* (1904), 1 C. L. R. 208, 232, per Griffith C.J.

<sup>2</sup> *Bills of Exchange Act*, 1909 ; *Copyright Acts*, 1905 and 1912 ; *Patents Act*, 1903-9 ; *Life Assurance Companies Act*, 1905 ; *Marine Insurance Act*, 1909 ; *Naturalization Act*, 1903 ; *Designs Act*, 1906 ; *Coinage Act*, 1909.



impose customs, excise, and normally to grant bounties, there is nothing in the constitution to support the view that they are otherwise restricted in action, nor is it necessary to ascribe to their police power the authority in this regard which they have exercised. It does not appear that in *The King v. Sutton*<sup>1</sup> the right of the States to deal with external trade was effectively denied, and, if it was, the matter clearly stands open for reconsideration. As regards naturalization the position created by the constitution was obscure ; it was argued by Mr. Justice Clark<sup>2</sup> that s. 118 gave every person naturalized in any colony naturalization in the Commonwealth and the other States, but this is most improbable. The matter was disposed of by the Commonwealth *Naturalization Act*, 1903.

The result of concurrent legislation by Commonwealth and State may thus take different forms.<sup>3</sup> The Commonwealth legislation may, as in the case of naturalization, entirely supersede that of the State. Or it may merely supersede it to the extent to which it is repugnant to the paramount enactment. Or again, the two Acts may operate together, thus both can impose income tax. Or possibly the united action of both may be requisite to render either effective ; thus under the war moratoria which were enacted by both Commonwealth and States, it is possible that an order for sale by a mortgagee despite the moratorium might only have been operative if both enactments had authorized it. Moreover, the limits of s. 109 are clearly shown in *The Commonwealth v. New South Wales*,<sup>4</sup> where it was held that the Commonwealth can, in virtue of its powers, expropriate land and vest it in some one, but that it cannot compel the State to register it on any other system than that ordained by State Act. The transfer of the land is good ; registration is not necessary for its validity, despite the State Act, but the Commonwealth cannot insist on changing the laws of the State as to land registration in order to provide for the exercise of its power.

<sup>1</sup> (1907) 5 C. L. R. 789. Cf. Clark, *op. cit.*, pp. 76 ff.

<sup>2</sup> Clark, *op. cit.*, pp. 96-102.

<sup>3</sup> Kerr, *Austr. Const.*, pp. 10-12.

<sup>4</sup> (1923) 33 C. L. R. 1.

§ 5. *Relations of the Legislative Powers of the States and the Commonwealth*

By reason of the restriction of appeal from the High Court to the Privy Council on constitutional issues save by its own certificate, the interpretation of the Commonwealth Constitution has lain largely in the hands of the High Court. This fact has resulted in a very interesting phenomenon ; whereas with but little variation the interpretation of the Canadian constitution has proceeded on the same lines, in the case of the Commonwealth a whole series<sup>1</sup> of important decisions has been pronounced by the Court, differently constituted, to have been based on an unsound theory, and the result is that the earlier decisions of the Court are all open to doubt, in so far as the theory in question was adduced to support the conclusions arrived at. As the theory appeared to the writer<sup>2</sup> unsound, when he produced the first edition of this work, its final abandonment is naturally gratifying as a triumph of mature reasoning over preconceived ideas of the nature of a federal constitution, but it is true that there must elapse a considerable period before any certainty can be restored as to the meaning of important points in the constitution. Nor can an element of uncertainty be overlooked ; the interpretation of the constitution has been once seriously changed ; it is too much to predict that no such result will occur again.

(a) *The Immunity of Instrumentalities*

In *D'Emden v. Pedder*,<sup>3</sup> on appeal from the Supreme Court of Tasmania, the High Court enunciated the famous doctrine of the immunity of instrumentalities, which implies a prohibition on the States or Commonwealth to use their power in order to affect, however incidentally, the free exercise of the authority of the other, a doctrine laid down by Chief Justice Marshall in 1819 for the United States in *McCulloch v. State of Maryland*,<sup>4</sup> and ever since regarded as fundamental in American constitutional law. It emphasized that it was not a question of actual

<sup>1</sup> *Engineers' Case* (1920), 28 C. L. R. 129.

<sup>2</sup> See ed. I, ii. 833-5.

<sup>3</sup> (1904) 1 C. L. R. 91. Cf. *Municipal Council of Sydney v. The Commonwealth*, *ibid.*, 208 ; *Roberts v. Ahern*, *ibid.*, 406. Contrast *Wollaston's Case* (1902), 22 V. L. R. 357, 387, 388, *per* Madden C.J.

<sup>4</sup> 4 Wheat. 316.

interference taking place, but of the possibility, and it laid it down that it was not possible to read the Tasmanian Act, 2 Edw. VII. No. 30, imposing a duty of 2d. on every receipt for £5 or over as applicable to a receipt given by the officers of the Commonwealth in respect of their salaries, in accordance with the *Audit Act*, 1901, of the Commonwealth, which demands written vouchers in respect of salary payments. It was also pointed out that in Ontario and New Brunswick the Courts had applied the doctrine to efforts to tax federal officers' salaries, and, while it was admitted that there was no ground to accept as binding American decisions, great stress was laid on the probability that similar provisions in the Commonwealth constitution should receive similar effect. The fact that State Acts were to continue in force as a matter of principle, or that the Crown might disallow State Acts which menaced the federation, was dismissed as irrelevant to the issue. This was followed inevitably by the adoption of the same doctrine as regards State income tax in *Deakin v. Webb* <sup>1</sup> and *Lyne v. Webb*, where it was ruled that the imposition of income tax would hamper federal executive power, that the issue was one of the constitutional powers of the Commonwealth and the States *inter se*, and that, accordingly, it was one in which appeal to the Privy Council would lie only on a certificate of the High Court, which in the opinion of that body should not be given, the High Court being properly the authority to decide issues of constitutional character. Similarly, the High Court ruled in *The Commonwealth v. State of New South Wales* <sup>2</sup> that, if a vendor transferred to the Commonwealth land expropriated by the Commonwealth, his action could not be fettered by stamp duties under the New South Wales *Stamp Duties Act*.

At that time it was still open to the Supreme Courts of the States to deal with constitutional issues affecting the relative powers of the Commonwealth and the States, and accordingly in *Webb v. Outtrim* <sup>3</sup> an appeal was brought from a judgement of the Supreme Court of Victoria to the Privy Council. The Privy Council held that the true method of interpretation was to look to the powers of the States under the constitution ; to note the provisions of the constitution continuing these powers

<sup>1</sup> (1904) 1 C. L. R. 585. Cf. *The King v. Bawden*, 1 Tas. L. R. 156.

<sup>2</sup> (1906) 3 C. L. R. 807.

<sup>3</sup> [1907] A. C. 81.

unless taken away ; and to conclude that, unless and until some definite enactment could be pointed to, showing that the powers of the State to tax had been taken away, the taxation must be deemed valid. The doctrine of *McCulloch v. Maryland* was definitely declared not to be applicable to the Commonwealth constitution, which was not that of the federation of the United States, and the interpretation of that constitution had not relevantly been shown to be applicable to it. In *Baxter v. Commissioners of Taxation, New South Wales*,<sup>1</sup> the High Court was faced with the necessity of deciding whether it would follow the decision of the Privy Council or not. It was decided by the majority (Griffith C.J., Barton and O'Connor JJ.) that the High Court was entitled to follow its own judgement and to disregard the view of the Privy Council, and the arguments of the Council were controverted in detail. The fact stressed by the Council, that s. 114 with its express prohibition of taxation of property of State or Commonwealth by the other was a serious objection to the doctrine of implied prohibition, was met by the contention that the section was intended to negative the American distinction between property held by a government *qua* government, which was immune, and property held by it *qua* a commercial concern, which was not immune. Certain misconceptions as to the sense of the term 'unconstitutional' were removed, the majority insisting that to them it merely meant *ultra vires*, and that they founded the doctrine of implied prohibition on the Act of 1900 itself, and not on any vague theories. Isaacs J.<sup>2</sup> dissented, holding that, while the Privy Council judgement might properly not be held to be binding on the High Court, seeing that it had the right to prevent appeals going to the Privy Council in such cases from its own decision, yet the matter ought to be reconsidered, and the decision on its merits should be that of the Privy Council. Higgins J.<sup>3</sup> went further, and held that the mere fact that the High Court could in a certain class of cases prevent appeals going to the Council did not in the slightest impair the superior weight of the power of the Council, when it did deliver a judgement. It must be admitted that, while the judgement of the majority was able, it was not convincing as an exposition of law ; there was a good deal of

<sup>1</sup> (1907) 4 C. L. R. 1087.

<sup>2</sup> *Ibid.*, at p. 1159.

<sup>3</sup> *Ibid.*, at p. 1161.

rhetoric regarding the sovereignty of the States and the Commonwealth—which after all was hardly a very exact term to apply to territories which then had no fraction of international status, and the justices doubtless were too much influenced in their views by the fact that they had been engaged more or less actively in the work of framing the constitution, and that in doing so they had always had American ideals before them. Their colleagues, on the other hand, lacked their reverence for the formalism and conservative spirit of the American Constitution, while in their turn they had a higher respect for the status of the Privy Council.

Nevertheless, the High Court showed some inconsistency in its application of the doctrine, common sense availing to conquer principle. Thus it refused, in *Attorney-General of New South Wales v. Collector of Customs*,<sup>1</sup> to accept the doctrine of the immunity of instrumentalities as applying to the claim of the New South Wales Government to import, free from all interference by the Commonwealth, steel rails required for her railways. It was held in lieu that in some matters the constitution evidently meant to give paramount power to the Commonwealth to bind the States, as in regard to customs (i), immigration (xxvii), quarantine (ix), and weights and measures (xv), for otherwise the whole purpose of the Commonwealth legislation might be made of no effect. Still less was the doctrine pressed when the imported articles were wire netting for sale to farmers, in *The King v. Sutton*,<sup>2</sup> as it was absurd to reckon these instrumentalities. It must be noted that in both cases the majority of the Court, which had previously interpreted s. 114 as deliberately intended to forbid taxation of a State's property even in its commercial aspect, had to resort to the view that the tax was imposed on importation, not on property. Further, it was ruled that State stamp duty on cheques drawn by customers on the Commonwealth bank was in order,<sup>3</sup> and also State stamp duty on a transfer of land by the Commonwealth to an individual.<sup>4</sup> Moreover, the judgement as to State income tax was rendered innocuous by the passing of legislation by the Commonwealth purporting to authorize the levying of income

<sup>1</sup> (1908) 5 C. L. R. 818.

<sup>2</sup> (1908) 5 C. L. R. 789.

<sup>3</sup> *Heiner v. Scott* (1915), 19 C. L. R. 381.

<sup>4</sup> *The Commonwealth v. State of New South Wales* (1918), 25 C. L. R. 325.

tax. This Act was manifestly invalid, on a strict application of the doctrines of the Court, but it managed to rule it valid in *Chaplin v. Commissioners of Taxation for South Australia*<sup>1</sup>; to such straits do unsound judgements reduce a Court.

(b) *The Reserved Powers of the States*

Essentially connected with the doctrine of immunity of instrumentalities was that of the reserved powers of the States, which it was implied in the Constitution must not be interfered with, except under clear authority in the Constitution itself. In *Federated Amalgamated Government Railway &c. Association v. New South Wales Traffic Employees' Association*<sup>2</sup> it was ruled that this doctrine prohibited the registration of an organization consisting entirely of federal employees of a State railway, and in *Federated Engine Drivers' and Firemen's Association v. Broken Hill Proprietary Co.*<sup>3</sup> that the Board of Water Supply and Sewerage, Sydney, was a State Governmental agency, and was not bound by an industrial award under the *Commonwealth Conciliation and Arbitration Act*, though in a subsequent case *eodem nomine*<sup>4</sup> it was ruled that a municipality is not a State instrumentality, and, therefore, is bound by federal legislation.

A much more valid view was that taken in *Peterswald v. Bartley*,<sup>5</sup> in which it was vainly sought to find invalid the brewers' licence fees imposed under the New South Wales *Liquor Act*, No. 18 of 1898, on the score that the State was in effect levying excise duties, a power possessed only by the Federation. The Court had no difficulty in insisting in this case that the powers of the States were not to be whittled down by an interpretation of excise which would confer on the Commonwealth power to regulate the carrying on of trades in each State. But a much more dubious result was achieved in *The King v. Barger*<sup>6</sup> in which was raised the validity of Mr. Deakin's famous policy of the 'new protection'; the Commonwealth by imposing the *Excise Tariff*, 1906, sought to regulate conditions of employment through the enactment that the duties would not be levied if certain conditions were complied with. There was

<sup>1</sup> (1911) 12 C. L. R. 375.

<sup>2</sup> (1906) 4 C. L. R. 488.

<sup>3</sup> (1911) 12 C. L. R. 398.

<sup>4</sup> (1913) 16 C. L. R. 245.

<sup>5</sup> (1904) 1 C. L. R. 497; 4 S. R. (N.S.W.) 290.

<sup>6</sup> (1908) 6 C. L. R. 41. See *Parl. Pap.*, 1907-8, Nos. 134, 147; 1908, No. 16.

the usual division of opinion, the majority holding the Act invalid, as a deliberate attempt to invade the sphere of the States by prescribing the conditions of manufacture of agricultural instruments, which was a State function. The minority held that the only concern of the Court was whether the Act was within the power to deal with excise, and it ruled out all considerations of indirect effect, as not matters for the Court, but for the Parliament and the electorate.

Another important case decided mainly on this head was the issue as to the validity of the *Trade Marks Act*, 1905, part vii, providing for the registration of a workers' trade mark, intended to show that goods were produced by a union of workers, and therefore under proper conditions. It was held in *Attorney-General for New South Wales v. Brewery Employees' Union*,<sup>1</sup> that the part was not valid, there being the usual division of majority and minority views. O'Connor J. pointed out that the new trade mark did not comply with the ordinary rule that such a mark connotes connexion between goods and an owner, and a distinction between goods and other goods of the same general kind. He admitted that in itself it might be held that the enactment was covered by the commerce power, but it was impossible to uphold the validity of the mark, when it was clearly meant to usurp the power of the States to regulate conditions of internal manufacture. The minority held that the mark came quite fairly within the term used in the Constitution, and that the law was valid.

(c) *The Abandonment of the Doctrine of Immunity of Instrumentalities*

The unwisdom of the doctrine was recognized by the High Court, in effect though not in theory, when in *Attorney-General for Queensland v. Attorney-General for the Commonwealth*<sup>2</sup> an effort was made to claim that the *Federal Land Tax Assessment Act*, 1910-14, must be deemed invalid, seeing that in effect it interfered with the State's administration of the waste lands, vested in the States by the Crown under Imperial Acts. But the doctrine was formally disavowed in *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.*,<sup>3</sup> where the issue was

<sup>1</sup> (1908) 6 C. L. R. 469.

<sup>2</sup> (1915) 20 C. L. R. 148.

<sup>3</sup> (1920) 28 C. L. R. 129.

definitely raised. The respondents were carrying on operations for the State of Western Australia under the *State Trading Concerns Act*, 1914-16, and there were circumstances in which an industrial dispute could be held to exist, if the respondents were subject to the *Commonwealth Conciliation Act*. The decision in the case of the railway servants of New South Wales<sup>1</sup> had negatived the application of the Act; the High Court took precisely the opposite view, declining, despite the fact that it was thus reversing a fundamental principle of interpretation of the constitution, to allow an appeal to the Privy Council, while a very ill-advised effort of the States to secure leave from the Privy Council, the hopelessness of which was pointed out by the writer,<sup>2</sup> resulted in the contemptuous dismissal of a hopeless case.<sup>3</sup>

The case might indeed have been disposed of consistently with the acceptance of the doctrine of the immunity of State instrumentalities by accepting the quite valid United States distinction, e. g. in *South Carolina v. United States*,<sup>4</sup> between the validity of the claim in case of governmental functions and its inapplicability to mere trade activities. If, as is the case, the doctrine of immunity rests on an implicit covenant by the parties to a federal compact that the federation and states will allow each other free use of their instrumentalities, it is clear that this implied contract is not violated by the taxation, for instance, of commercial activities. But the decision works on a much broader basis. The Court definitely rejected the old doctrine of immunity of instrumentalities, none of those judges who had maintained it being any longer alive. It deliberately laid down the principle adopted by the Privy Council, that the Act of 1900 should receive a statutory construction, as opposed to that based on the conception adopted by Sir S. Griffith of a federal compact. It adopted, it is true, the decisive language of *D'Emden v. Pedder*:<sup>5</sup> 'when a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control, or interfere with the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the constitution, is to

<sup>1</sup> (1906) 4 C. L. R. 488.

<sup>2</sup> Keith, *J. C. L.* iv. 107 f.; v. 278.

<sup>3</sup> *Minister for Trading Concerns of Western Australia v. Amalgamated Society of Engineers*, [1923] A. C. 170.    <sup>4</sup> 199 U.S. 437.    <sup>5</sup> (1904) 1 C. L. R. 91.



that extent invalid and inoperative'. This doctrine, however, it based expressly on the terms of s. 109 of the Constitution, thus excluding any idea of immunity of State instrumentalities, and merely asserting the statutory doctrine of the paramount character of the law of the Commonwealth. This paramount nature, if it had existed in the United States constitution, might easily have prevented the development of the doctrine of the immunity of instrumentalities, for it would have been possible for the Federal Legislature to effect by legislation what had to be asserted by the Courts, that the federal authority to establish the National Bank was sufficient to prevent the States seeking to impose excessive taxation on the Bank. In the United States the doctrine had logically to be extended to the States as well, but the doctrine of the High Court, resting on the statutory interpretation of the Act, need not read anything into it in contrast to Sir S. Griffith's reliance on the theory of implied contract.

The Court held that *D'Emden v. Pedder* could be held sound law on this doctrine of paramountcy, on the narrow ground that the *Audit Act* of the Commonwealth insisted on a receipt, while the State Act endeavoured to interpose a stamp which was inconsistent with the Commonwealth Act. Similarly it rejected the view that the income tax cases<sup>1</sup> could be settled on the theory of immunity, but indicated that there might be worked out repugnancy, incidentally making it possible to admit the validity of the legislation permitting federal taxation of federal salaries, which was really illogical on the old doctrine. The *Railway Servants' Case*<sup>2</sup> was definitely overruled, on the score that there was no possible means of distinguishing the circumstances there from the case being decided, and it was pointed out that it was hopelessly inconsistent with the decision in *Attorney-General for New South Wales v. Collector of Customs*.<sup>3</sup> Other cases were left for subsequent consideration.

A logical conclusion followed; in *The Commonwealth v. State of Queensland*<sup>4</sup> it was ruled that it was fully within the power of the Commonwealth to enact that State income tax should not be payable on federal loan interest, this being a derivation

<sup>1</sup> *Deakin v. Webb* (1904), 1 C. L. R. 586; *Baxter v. Commissioners of Taxation* (1907) 4 C. L. R. 1087.

<sup>2</sup> (1906) 4 C. L. R. 488.

<sup>3</sup> (1908) 5 C. L. R. 818.

<sup>4</sup> (1920) 29 C. L. R. 1.

from the unfettered power of borrowing money, which made it possible to decide as to the terms, and in *Davoren v. Commonwealth Commissioner of Taxation*<sup>1</sup> it was held with equal decision that there was no reciprocity, and that State salaries were not exempt from Commonwealth income tax. There can be no doubt that the doctrines are sound, however little palatable they may be to the States, which have so long profited by the doctrine of immunity.

(d) *Control of Companies*

The federal power as to companies is very far from being accurately defined. In *Huddart Parker & Co. Proprietary Ltd. v. Moorehead*<sup>2</sup> the issue was the question of the legality of ss. 5 and 9 of the *Australian Industries Preservation Act, 1906*,<sup>3</sup> which sought to prevent foreign companies and financial or trading companies formed within the Commonwealth combining to restrain trade to the detriment of the public, or to destroy by unfair competition any Australian industry, or to monopolize trade to the detriment of the public. It was sought to justify these provisions under s. 51 (xx), but the Court was unable to accept this theory. There was agreement that the head in question gave no power whatever to create corporations, and Griffith C.J. and Barton J. held that the power conferred permitted the Commonwealth to lay down that such corporations might not engage at all in trade within a State, or subject operations to conditions, but they denied that the Commonwealth could regulate the mode of carrying on operations when the companies were admitted to trade in a State. O'Connor and Higgins JJ. in effect held that the Commonwealth could only deal with the recognition of the status of companies as legal entities, and prescribe conditions for such recognition, but that it could not regulate the contracts to be made by such companies once recognized. Isaacs J. alone held that the authority given in (xx) must be wide enough to cover the regulation of the dealings of such companies with persons outside the companies. The proposal to increase the power of the Common-

<sup>1</sup> 29 A. L. R. 129. So, of course, as to loans.

<sup>2</sup> (1908) 8 C. L. R. 330.

<sup>3</sup> For the limited scope of the Act, see *A.-G. for the Commonwealth v. Adelaide Steamship Co.*, [1913] A. C. 781 ; (1912) 15 C. L. R. 65.

wealth which was brought forward in 1911 was defeated as regards this defect as well as other matters.

A corporation, it has been decided, is not a resident in a State,<sup>1</sup> and accordingly a corporation formed in one State is debarred from using the original jurisdiction under s. 75 (iv) of the High Court to bring an action against a resident of another State,<sup>2</sup> and seemingly the rule of s. 117 against discrimination as to subjects as residents is not applicable to the case of a corporation. This seems a narrow interpretation of the Act and may be reversed ultimately.

### (e) *Arbitration Law*

The Commonwealth power to legislate as to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State has caused endless difficulties of interpretation. Apart from matters which merely depend on the wording of the Acts dealing with the subject, there has been a fundamental conflict of opinion as to the relation of the Court to the similar agencies for conciliation in the States, and there is no doubt that the new outlook of the Court renders part of the older jurisprudence definitely inapplicable.

In the *Federated Saw Mill, Timber Yard and General Woodworkers' Employees' Association v. James Moore & Sons Proprietary Ltd.*<sup>3</sup> the issue was definitely raised what was the relation of awards under the federal Act and (1) awards of a State Arbitration Court ; (2) industrial agreements made and registered under State statutes ; (3) industrial agreements enforceable under State law, and (4) determinations of Wages Boards authorized by the States to fix minimum wages. The whole Court held that the awards of the Commonwealth Court of Conciliation and Arbitration could override the first three sets of conflicting determinations ; but the Chief Justice and O'Connor J. ruled that it could not override a State Wages Board award, for reasons which, as pointed out in the first edition of this work,<sup>4</sup> were almost unintelligible and quite unsatisfactory.

<sup>1</sup> *Australasian Temperance &c. Society v. Howe* (1922), 31 C. L. R. 290.

<sup>2</sup> For a just criticism, see Kerr, *Austr. Const.*, p. 241.

<sup>3</sup> (1909) 8 C. L. R. 465 ; Keith, *Journ. Soc. Comp. Leg.*, xii. 110 ff.

<sup>4</sup> ii. 848 ff. ; *Clyde Eng. Co. v. Cowburn*, 37 C. L. R. 466.

The same line of thought was followed in *Australian Boot Trade Employees' Federation v. Whybrow & Co.*<sup>1</sup> where the question was whether an award of the Court on boot trade conditions could be held valid in so far as it conflicted with conditions laid down under the *Industrial Disputes Act*, 1908, of New South Wales, the *Factories and Shops Act*, 1905, of Victoria, the *Wages Boards Act*, 1908, and the *Factories and Shops Act*, 1909, of Queensland, and the *Factories Act*, 1907, of South Australia. Griffith C.J.<sup>2</sup> held definitely, following up the line of thought in the *Woodworkers' Case*, that the function of an arbitrator was complete when he called on the parties to do something which they could legally do, and he found the award binding, because, while it fixed minima higher than those necessary under State law, there was nothing illegal in that, and the other terms as to payment of old, slow and infirm workers might be held to be consistent with the Victorian law. He relied in his judgement largely on the doctrine that the States had a reserve of authority which must not be invaded. Barton J.<sup>3</sup> who had been absent from the earlier case, concurred, relying on the principles asserted in the *Union Label Case*<sup>4</sup> and in *Huddart Parker & Co. v. Moorehead*.<sup>5</sup> O'Connor J.<sup>6</sup> was equally emphatic in denying that arbitrators could legislate; a Federal arbitration could outweigh a State arbitration, but it was worthless against a legal rate laid down by a State Wages Board. Isaacs and Higgins JJ.<sup>7</sup> were as usual united in the opposite sense. They argued forcibly that, without the power to override, the Court's function would be gravely impaired, and often satisfactory results could only be attained by laying down rules which applied equally to the States. They could not see any difficulty in holding that arbitral awards were in the nature of legislation, as being authorized by the Constitution, and, as such, they had the validity of Commonwealth legislation, which was paramount over State determinations, and even the rates laid down by Wages Boards which were admittedly State legislation. Arbitrators could not be bound by the laws of the States; they existed in fact to find solutions beyond the laws of the States. All the judges, however, were agreed in ruling out as affecting

<sup>1</sup> (1910) 10 C. L. R. 266; contrast 37 C. L. R. 466.

<sup>2</sup> *Ibid.*, 278 ff.

<sup>3</sup> *Ibid.*, 289 ff.

<sup>4</sup> 6 C. L. R. 469.

<sup>5</sup> 8 C. L. R. 330.

<sup>6</sup> 10 C. L. R., at pp. 301 ff.

<sup>7</sup> *Ibid.*, 310 ff., 331 ff.

the case the *Factories and Shops Act* of Victoria, No. 2241, which was passed apparently as a means of affecting the pending judicial award of the High Court.

Another aspect of the case came up in *R. v. Commonwealth Court of Conciliation and Arbitration*.<sup>1</sup> That Court had on an application by the employees of the boot trade made an award, and the award was made a common rule for the industry. The High Court was asked to prohibit the Court and the Employees' Federation acting on the award. Prohibition was held to lie by all four justices on a number of technical grounds, but Griffith C.J.<sup>2</sup> ruled that s. 39 of the Act constituting the Court was *ultra vires*, since it subordinated a State award or law to the determination of the Court, and he indicated grave doubt as to the validity of the common rule, but he rejected the contention that the constitution of the Court was invalid, since it implied compulsion and did not contain any representatives chosen by the parties. Admitting that parts of the Act were *ultra vires*, he discussed the American doctrine that the test of the validity of an Act of this kind was that the Act should be pronounced invalid, if the Court after consideration of the Act and its *ultra vires* portion was unable to hold that, if the Legislature had known that part would be *ultra vires*, it would have adopted the rest of the law. This criterion he disliked, for it involved conjectures which could not be satisfactory, and in lieu he enunciated the doctrine of the true test as whether the law minus the *ultra vires* portions would be substantially a different law from what it would be with these portions retained. Being unable to hold that the law would be thus vitally changed, he held it valid as regards the sections other than those impugned. Barton J.<sup>3</sup> was very clear on the fact that arbitration did not mean legislation, that an arbitrator must merely require the persons concerned to do something they could legally do, and that arbitration could not include laying down a general law for industry. Isaacs J.<sup>4</sup> also indicated dubiety as to the general rule, while holding steadfast to his view of the wider power of arbitrators. In *Australian Boot Trade Employees' Federation v. Whybrow*<sup>5</sup> shortly afterwards the Court agreed that the common rule could not be supported; it was pointed

<sup>1</sup> (1910) 11 C. L. R. 1.

<sup>3</sup> *Ibid.*, 33.

<sup>4</sup> *Ibid.*, 42 ff.

<sup>2</sup> *Ibid.*, 20 ff.

<sup>5</sup> (1910) 11 C. L. R. 311.

out that the rule might, so far from promoting industrial peace, introduce strife where none existed, and thus could not be deemed arbitration or conciliation. This is not inconsistent with the finding in *George Hudson Ltd. v. Australian Timber Workers' Union*<sup>1</sup> that s. 3 of the *Conciliation and Arbitration Act*, 1921, is valid, though it makes an agreement between parties binding as an award, and that such an agreement binds the assigns of the contracting party. It was in that case expressly pointed out that the common rule was defective, because it extended the superficial area of a dispute, contrary to the operation of such an agreement as was in that case under examination. Further, the authority of the ruling that the Court cannot by award ignore a determination of a State Wages Board has been destroyed by the decision in *Federated Engine Drivers' and Firemen's Association v. Adelaide Chemical and Fertilizer Co.*,<sup>2</sup> in which it was held by the whole Court that the award of the Conciliation Court might give a lower minimum wage than that of a State Wages Board, the Court asserting that it did not homologate the views to the contrary in the earlier cases. They rested, in effect, on the doctrine of reserved powers, and that gone are of no further value.

It is now clear law<sup>3</sup> that a municipal corporation is subject to the power of the Court, and that a Minister of State in a State when engaged in conducting the trading concerns of the State is not exempt, as in the case of railways, steamship services &c. But it is still open whether in respect of the governmental functions of the State it can be brought under an award of the Court, and it may be that the better opinion is against such submission. In *Waterside Workers' Federation v. J. W. Alexander Ltd.*<sup>4</sup> it was held that the Court of Conciliation was not a Court within the meaning of the Constitution, in view of the President's limited tenure of office, and that, accordingly, it had not the power to impose its mandates by injunction.

A much more serious question was dealt with in *Waterside Workers' Federation of Australia v. Commonwealth Steamship Owners' Association*.<sup>5</sup> The issue was whether in setting up a Court of Conciliation and Arbitration the Commonwealth had

<sup>1</sup> (1923) 32 C. L. R. 413.

<sup>2</sup> (1920) 28 C. L. R. 1.

<sup>3</sup> *Engineers' Case*, 28 C. L. R. 129; cf. 37 C. L. R. 466.

<sup>4</sup> (1918) 25 C. L. R. 434.

<sup>5</sup> (1920) 28 C. L. R. 209.

the power to prescribe conditions which the Court must observe in its efforts to settle disputes ; could it enact, as in s. 28 of the Act, that, if the Court made an order, it must be limited in duration to five years plus the period necessary for making a new award or rescinding the old ? The Court affirmed by a majority the validity of the clause, but it must be admitted that there is much weight in the judgement of Isaacs and Rich JJ. which insists that the law has no right to dictate the terms of his decisions to the arbitrator, or to make him decide the matter in any way other than a genuine arbitration, one element of which must necessarily be a dispassionate consideration of the period for which an award should run.

It has been held in *Merchant Service Guild of Australasia v. Newcastle and Hunter River Steamship Co. Ltd.*<sup>1</sup> that conciliation and arbitration are available to prevent as well as to settle industrial disputes, and that it is not the case that conciliation alone is available to prevent and arbitration to settle disputes. Further, it is clear that the Commonwealth can provide for the organization of employers and employees in order to secure due presentation of claims to the Court, and can even forbid lock-outs or strikes under s. 51 (xxxix) as incidental to the exercise of the power in (xxxv), though Gavan Duffy and Rich JJ. dissented,<sup>2</sup> and an agreement to refrain from an application to the Commonwealth Court is bad as against public policy, a decision which reversed an earlier pronouncement of the High Court to exactly the opposite effect.<sup>3</sup>

It is impossible, by legislation under the conciliation power, to exclude the High Court from issuing prohibition to the Court for excess of jurisdiction,<sup>4</sup> but the High Court has upheld<sup>5</sup> a curious provision allowing a Justice in Chambers to settle without liability to appeal the legal question whether there is an industrial dispute within the meaning of the constitution, and

<sup>1</sup> (No. 1) 16 C. L. R. 591.

<sup>2</sup> *Stemp v. The Australian Glass Manufacturing Co.* (1917), 23 C. L. R. 226.

<sup>3</sup> *Australian Agricultural Co. v. Federated Engine Drivers', &c., Association* (1913), 17 C. L. R. 261, reversing *J. C. Williamson, Ltd. v. Musicians' Union of Australia* (1912), 15 C. L. R. 636.

<sup>4</sup> *Tramways Case* (No. 1), 18 C. L. R. 54 ; cf. *R. v. Commonwealth Court of Conciliation* (1910), 11 C. L. R. 1.

<sup>5</sup> *Federated Engine Drivers' and Firemen's Association v. Colonial Sugar Refining Co.* (1916), 22 C. L. R. 103.

any other legal issue, on the application of the parties. The Privy Council has ruled that no appeal lies to it in such a case as to the existence of a dispute without a certificate, and it is uncertain whether a Justice in Chambers could give such a certificate. This is anomalous, for the rule of the Judiciary Act is that unless the full Court sits there shall not be given a decision on a constitutional issue, unless a majority of all the Justices concurs in the finding.

(f) *The Coasting Trade, Navigation and Shipping*

In *SS. Kalibia v. Wilson*<sup>1</sup> the High Court had to determine the validity of the *Seamen's Compensation Act*, 1909. The case itself raised the issue very indirectly; the ship was trading from New York to Australian ports, and merely out of courtesy a tiny parcel was carried from Adelaide to Brisbane, which was only in the most formal sense engaging in the coasting trade, and the matter might well have been disposed of on that ground. But the injured seamen came within the working of the Act as being injured while on a British or foreign ship, not registered in Australia, engaged in the coasting trade, and the High Court considered whether this provision could be made *intra vires*. It held that the authority as to navigation and shipping given in s. 98 merely enlarged the authority as to trade and commerce in s. 51 (i) by making it clear that it included shipping, and gave power to regulate conditions affecting seamen, but it did not remove the restriction to commerce between the States or with foreign countries. It gave no power to deal with intra-State shipping. Now it was clear from the Act itself that it was essentially part of the coasting trade under the Act to take up cargo at one port in a State for carriage to another, and that certainly was invalid. Nor was this a case where the invalid part could be omitted and the rest stand, for, when the Legislature showed a deliberate intention to treat all ships alike, it would be enacting a new law to lay down what it intended for all as applying to some only. The Act of 1909 was, therefore, ruled invalid, and had to be replaced by an improved and limited measure in 1911. The same doctrine, denying power to regulate conditions for intra-State shipping, was asserted in *Newcastle and Hunter River Steamship Co. v. Attorney-General*

<sup>1</sup> (1910) 11 C. L. R. 689.



for the Commonwealth.<sup>1</sup> On the other hand, efforts to deny the power of enacting shipping legislation in the wide sense of that term usually recognized in Colonial Acts was defeated in *Australian Steamships Ltd. v. Malcolm*<sup>2</sup>

In *Merchant Service Guild of Australasia v. Commonwealth Steamship Owners' Association*<sup>3</sup> it was held that, apart from s. 5 of the Commonwealth Constitution Act, the normal rules of territorial jurisdiction must be applied, and the industrial disputes which are to be settled under Commonwealth law must be disputes as to terms and conditions of industrial operations in Australia only ; a dispute under the Act does not include a dispute in Australia between shipowners of various nationalities and their crews as to the terms on which employment should proceed in the various countries. This ruling explains the reluctance of shipowners during the strike of British seamen in Australian ports in 1925 to take any part in proceedings before the Court, when the President proposed to convene a compulsory conference to consider the ending of the strike.

In *Merchant Service Guild of Australasia v. Commonwealth Steamship Owners' Association (No. 2)*<sup>4</sup> it was held that under s. 5 of the Constitution Act a single and indivisible dispute was none the less a dispute extending beyond the limits of any one State, because certain of the matters involved in the dispute were done beyond the range of territorial waters, and that the Court had jurisdiction in such a case to lay down terms of service, &c. In *Holyman's Case*<sup>5</sup> the fact that the owners did business in Tasmania only was not held to prevent there being a dispute extending beyond the limits of the State.

#### (g) *The Prohibition of Discrimination*

The express prohibitions imposed on the Commonwealth as regards finance and trade will be considered below, but there is a general prohibition in s. 117 against discrimination on the score of residence. There are various possible applications of the doctrine, but mostly of no probability, unless in the case of treatment of trustees differentially if resident in the States or

<sup>1</sup> (1921) 29 C. L. R. 357.

<sup>3</sup> (1920) 28 C. L. R. 436.

<sup>4</sup> 16 C. L. R. 664.

<sup>2</sup> (1915) 19 C. L. R. 298.

<sup>5</sup> (1914) 18 C. L. R. 273.

not ; in such cases any differentiation by State Acts must now be read to apply merely to absence from the Commonwealth. The section applies only to subjects of the Crown who are resident, and the benefit of no discrimination has no application either to aliens or to such subjects of the Crown as are not resident, in the sense of that term which connotes a measure of permanence ; thus a person admitted under a temporary permit to visit Australia as a student or merchant is not a resident.<sup>1</sup> Nor, apparently, is a corporation to be deemed a resident, though this seems artificial. The clause has been held, clearly rightly, in *Lee Fay v. Vincent*,<sup>2</sup> not in the slightest degree to interfere with the States dividing up their own subjects into classes and treating them differentially. Nor is it of much importance, for in *Davies and Jones v. Western Australia* <sup>3</sup> it was laid down that the differentiation must be on residence only ; if, for instance, it is based on domicile, then it is perfectly valid to allow lower rates of duty to be levied on estates, the beneficial interest in which passes to persons domiciled in Western Australia.

The more general issue, whether the Commonwealth can legislate under its powers for one State only, e. g., pass an insolvency law for Victoria, is not yet answered by any reported case. It seems clear that it could be ; the instances cited from Canada are cases merely of legislation under the residual power of the Dominion, and even they are in no wise decisive against the power, if it should happen to be the case that such legislation for one province was reasonably necessary for the peace, order, and good government of Canada. At any rate, the absence of any close parallel between the constitutions renders any deduction useless.

#### (h) *Immigration and Aliens*

The power of the Commonwealth to determine conditions of naturalization carries with it the right to deprive a man of naturalization if he prove unworthy, and the power to deport is one which was asserted successfully in the case of the removal from the Commonwealth of the Kanakas,<sup>4</sup> and later more generally asserted in *Ferrando v. Pearce* <sup>5</sup> as legitimate both

<sup>1</sup> See Kerr, *Austr. Const.*, pp. 72 ff.

<sup>2</sup> (1908) 7 C. L. R. 389.

<sup>3</sup> (1904-5) 2 C. L. R. 29.

<sup>4</sup> (1906) 4 C. L. R. 395.

<sup>5</sup> (1918) 25 C. L. R. 241.

under the power as to defence (vi) and as to naturalization and aliens (xix).

Immigration denotes, it is decided in *R. v. Macfarlane*,<sup>1</sup> the entry into Australia even for the most temporary purpose of any person who cannot properly be said to be returning home when he enters. It is clear that immigration does not apply to any person who leaves Australia merely temporarily, with the intention to return, nor would mere length of time prove the absence to be a definite abandonment. Further, it is open to doubt whether it is right<sup>2</sup> to define as immigration the return to the Commonwealth of any person born there; certainly it has been held that a little boy, the illegitimate son of a woman in Victoria, could be taken by his father when aged five to China, and that on his return to Australia he could not be deemed an immigrant.<sup>3</sup> This seems the sound view; birth in a country and British nationality may well be held to fix that country as definitely one into which he cannot be said to immigrate. Nor, from the point of view of public policy is there any ground for encouraging the use of the power to prevent immigration to force other countries to keep a man whose original home was Australia; the principle adopted by the United Kingdom of accepting British nationals may be too wide, but clearly no part of the Empire ought to assert the right to refuse ultimately to be responsible for its own people, and the one effectively valid test is birth and nationality.

The power has been pressed in *R. v. Macfarlane* to empower the Commonwealth to provide that any immigrant, within three years after immigration, may be arrested, examined by a Board and deported, if thought fit, on the score of advocating the overthrow of established government. The Act was ineffectively opposed on the grounds that the power to legislate did not apply to exclude or deport British subjects, or at any rate those subjects who merely came for temporary purposes, nor in any case to deport immigrants for acts done after arrival. Isaacs J.<sup>4</sup> committed himself to the view that any immigrant, i. e., any person not Australian born returning to the Commonwealth, remained an immigrant for the rest of his life. This is

<sup>1</sup> (1923) 32 C. L. R. 518.

<sup>2</sup> As in 36 C. L. R. 404.

<sup>3</sup> *Potter v. Minahan* (1908), 7 C. L. R. 277; *A.-G. for the Commonwealth v. Ah Sheung* (1907), 4 C. L. R. 949.

<sup>4</sup> 32 C. L. R., at p. 555.

true, but as Higgins J.<sup>1</sup> observed, the power given is not to legislate as to immigrants but as to immigration, and there are probably bounds beyond which the High Court will not go in sanctioning the validity of legislation of this kind. In the much disputed case of the efforts to deport Johannsen and Walsh in 1925,<sup>2</sup> the measure under which it was sought to act was s. 7 of the *Immigration Amendment Act*, 1925, No. 7, passed in view of the shipping strike, primarily concerning British seamen, but supported by Australian agitators. The law permitted the proclamation of a state of serious industrial disturbance, and, when such a proclamation had been issued, the Minister, if satisfied that any person not born in Australia had been concerned in Australia in acts directed towards hindering or obstructing, to the prejudice of the public, the transport of goods or the conveyance of passengers in relation to trade and commerce with other countries or between the States, and that the presence of such person in the Commonwealth was prejudicial to its peace, order, and good government in the sphere of Commonwealth authority, might summon him before a Board to show reason why he should not be deported. The Act was held invalid on varying grounds by the Court; one view insisted on the fact that the Minister was apparently given the discretion to decide whether acts were really directed against matters within Commonwealth as opposed to merely State jurisdiction; further, exception was taken to the fact that in one of the cases the man had entered the country before the Commonwealth commenced, and therefore could not possibly be regarded as an immigrant, while objection was indicated towards the application of the Act to any person, however long in Australia and however much identified by residence with the Commonwealth.

The right of the States to legislate as to immigration is not wholly absent, but its limits are indicated by *R. v. Smithers, Ex parte Benson*,<sup>3</sup> where it was held by the High Court that the New South Wales Parliament could not legally provide that, if any resident of the State had been convicted of an offence in another State punishable by imprisonment for a year or upwards, he could not re-enter the State for a period of three

<sup>1</sup> *Ibid.*, at p. 574.

<sup>2</sup> Keith, *J. C. L.* viii. 133-5; 37 C. L. R. 36.      <sup>3</sup> (1913) 16 C. L. R. 99.

years at least after the conclusion of his sentence. Griffith C.J. and Barton J. doubtless inclined to treat the matter as controlled by the principles of the United States constitution, and rulings as to the police power of the States to make regulations on immigration despite the paramount power of the federation. But the true view of the case was taken by Isaacs and Higgins JJ., who insisted on the rule that what was to be considered was how far the State law could be read consistently with s. 92 of the Constitution, demanding freedom of intercourse between the States. It is, however, clear that in a proper case some restraint might be exercised by a State. But the new and proper mode of interpretation of the constitution relegates the police power of the States to the limbo of alien conceptions needlessly introduced into the discussion of the constitution.

(i) *The Defence Power*

The stress of the Great War unquestionably strained greatly the interpretation of the Commonwealth Constitution, and aided the development of the new doctrine that all that is to be considered is the statute, negating the older attempt to interpret the Constitution on American lines. Before the war the only case of note was *Krygger v. Williams*,<sup>1</sup> in which it was unsuccessfully sought to use s. 116 prohibiting Commonwealth legislation denying the free exercise of any religion as an argument against the validity of compulsory military training and service under the *Defence Act*, 1903–10. This contention was easily disallowed, among American cases cited against the claim being *Mormon Church v. United States*,<sup>2</sup> the famous declaration of the validity of the cancellation by Congress of the Act of Incorporation of the Mormon Church. Far more difficult was the issue as to the validity of the Commonwealth claim by regulation under the *War Precautions Act* to fix the price of bread at a maximum during the continuation of the war. In *Farey v. Burvett*<sup>3</sup> the High Court upheld the power under s. 51 (vi and xxxix), defence, and matters incidental thereto, and Griffith C.J. held that, once the power to make regulations of this sort was admitted, it was not competent for the Court to

<sup>1</sup> (1912) 15 C. L. R. 366.

<sup>2</sup> 136 U. S. 1.

<sup>3</sup> (1916) 21 C. L. R. 433; *Pankhurst v. Kiernan* (1917), 24 C. L. R. 120 (destruction of property in war time).

decide whether the discretion of the Governor-General in Council was correctly used. For this he relied on *Lloyd v. Wallach*,<sup>1</sup> in which the High Court held that the Minister could not be required to explain the grounds of his belief that Wallach was disaffected or disloyal, and that it was a sufficient reply to a writ of *habeas corpus* that he was detained, under War Precautions Regulation 55 (1), under the warrant of the Minister reciting that, on information received, he had reason to believe and did believe that Wallach was disaffected or disloyal. Gavan Duffy and Rich JJ. may be excused for dissenting from this judgement, and holding that, the powers of the Commonwealth being enumerated powers, it was necessary under the principle laid down in *Colonial Sugar Refining Co.'s Case*<sup>2</sup> to treat the defence power in its natural interpretation, and not to give it a meaning which would destroy the authority of the States. None the less Isaacs J. in *The Welsbach Light Company of Australasia v. Commonwealth of Australia*<sup>3</sup> laid stress on the wide nature of the power; 'defence includes every act which in the opinion of the proper authority is conducive to the public security. Those who are entrusted with the ultimate power of guarding the national safety are not bound to subordinate that consideration to any other'. As the only matter at issue was a technical question of trading with the enemy, the proposition seems rather large for the occasion; but the actual decision was no doubt right, for the commerce power (i) might well be invoked in aid of it. More clearly valid still was the decision in *Ferrando v. Pearce*<sup>4</sup> that the Government could deport to Italy an Italian reservist called up by the Italian Government under an arrangement agreed to by the Commonwealth, and that the Attorney-General could authorize the Public Trustee to sell enemy subjects' shares. The legality of punishing efforts to prejudice recruiting was naturally asserted, no validity being accorded to the absurd plea that the recruiting was invalid as the troops were to be sent outside Australia.<sup>5</sup> In *Joseph v. Colonial Treasurer of New South Wales*<sup>6</sup> it was agreed that, if there was any power in the case of Australia of exercising the royal war prerogative, it did not vest in the Governors of the

<sup>1</sup> (1916) 20 C. L. R. 299.<sup>2</sup> [1914] A. C. 237.<sup>3</sup> (1916) 22 C. L. R. 268.<sup>4</sup> (1918) 25 C. L. R. 241.<sup>5</sup> *Sickerdick v. Ashton* (1918), 25 C. L. R. 506.<sup>6</sup> (1918) 25 C. L. R. 32.

States, and that action taken in connexion with the Wheat Pool Scheme to the detriment of the claimant by the New South Wales Government could not be justified under that plea ; how far the prerogative could be exercised without legislation or delegation, therefore, was not discussed. In *Jerger v. Pearce* <sup>1</sup> was upheld the right of the Governor-General to fix the date of termination of the war, under authority given in the *War Precautions Act*, 1914–18, and in *Roche v. Kronheimer* <sup>2</sup> it was held that the defence power gave full authority to enact the *Treaty of Peace Act*, 1919, and the regulations thereunder. In *Attorney-General for the Commonwealth v. Balding* <sup>3</sup> it was further declared that priority in respect of advances under the *Australian Soldiers' Repatriation Act*, 1917–18, was a perfectly valid enactment under the defence power, which included as a necessary appendage the resettlement of returned soldiers.

#### (j) *The Separation and Distribution of Powers*

There are traces in the jurisprudence of the High Court of American ideas of the separation of powers ; it may candidly be admitted that these views do little to help to an effective construction of the constitution, and, fortunately, in the main the High Court has refused to allow artificial distinctions to be drawn. But in *New South Wales v. The Commonwealth* <sup>4</sup> it has been held that the *Inter-State Commission Act*, 1912, was invalid in so far as by Part v it purported to constitute the Commission a Court of Record with power to grant injunctions, for the judicial power under s. 71 is only capable of being conferred on a Court proper. The High Court admitted, however, the validity of the *Royal Commissions Act* authorizing Royal Commissions to exercise a wide power of inquiry, summoning witnesses and enforcing attendance and answers by penalties.<sup>5</sup> But the Privy Council,<sup>6</sup> acting on the usual basis of taking the powers of the Parliament as they were enumerated,

<sup>1</sup> (1920) 28 C. L. R. 588.

<sup>2</sup> (1921) 29 C. L. R. 329.

<sup>3</sup> (1920) 27 C. L. R. 395. Sale of enemy subjects' shares was upheld under the War Precautions Regulation in *Burkard v. Oakley* (1918), 25 C. L. R. 422.

<sup>4</sup> (1915) 20 C. L. R. 54 ; cf. 35 C. L. R. 422 ; 36 C. L. R. 119.

<sup>5</sup> *Colonial Sugar Refining Co. v. A.-G. for the Commonwealth* (1912), 15 C. L. R. 182.

<sup>6</sup> *A.-G. for the Commonwealth v. Colonial Sugar Refining Co.*, [1914] A. C. 237.

found that the appointment of a Royal Commission to inquire into some definite matter over which the Commonwealth had legislative power was valid, but it was impossible to give general powers, on the footing that they were incidental to inquiries which the Parliament might in future direct.

The judicial power in the Commonwealth is limited by the constitution, and, therefore, it has been held by the majority of the High Court *In re Judiciary Act*,<sup>1</sup> that Part xii of the *Judiciary Act*, s. 88, which empowered the Governor-General to refer to the High Court any issue as to the constitutionality of a statute of the Parliament, and made the judgement of the High Court on such a reference final and not susceptible to any appeal, was beyond the power of the Parliament, as not being a true exercise of judicial power. Higgins J. dissented, emphatically disapproved of the doctrine of the separation of powers, and argued that there was nothing in the Constitution which prevented the assignment to the High Court of powers not strictly judicial. The contrast here with the case of Canada is complete, and arises directly from the separation of authority adumbrated in the Constitution. On the other hand, there is no objection to the conferring on executive officials of powers which in English law are often styled semi-judicial, for instance the power under the *Australian Industries Preservation Act*, 1906, of making inquiries from persons who may be able to give information regarding alleged violations of the Act,<sup>2</sup> or that under the *Immigration Act* conferred on a Board to investigate the issue whether or not a person should be deported.<sup>3</sup> These, it is laid down, definitely are Executive functions, and not an illegitimate entrusting to something other than a Court, within the meaning of the Constitution, of the judicial power.

It is a legislative act to provide for the forfeiture of enemy property,<sup>4</sup> and there is no principle in the Constitution requiring that the taking of property should, as in the United States, be subject to due process of law. Nor is there anything to prevent the Commonwealth passing *ex post facto* laws.<sup>5</sup> It has been

<sup>1</sup> (1921) 29 C. L. R. 257.

<sup>2</sup> *Huddart Parker & Co. Prop. Ltd. v. Moorehead* (1908), 8 C. L. R. 330.

<sup>3</sup> *R. v. Macfarlane* (1923), 32 C. L. R. 518. Cf. *Cornell v. Deputy Federal Commissioner* (1920), 29 C. L. R. 39, 47.

<sup>4</sup> *Roche v. Kronheimer* (1921), 29 C. L. R. 329.

<sup>5</sup> *R. v. Kidman* (1915), 20 C. L. R. 425.



held that a regulation made under statutory power <sup>1</sup> is not to be taken into account when it seeks to alter the law in a part-heard case, but it is very dubious if it is the case that the Commonwealth could not pass a statute which would place an interpretation on an Act for the purpose of a case about to come before the Courts ; it is suggested that this is the rule, because interpretation is a judicial function,<sup>2</sup> but this rests too much on the dubious analogy of American law to render it safe to hold it. Doubtless no Commonwealth Act would even purport to reverse a judgement of the High Court, though it might alter the law for the future, but it would be difficult to conceive a form in which the Act would be couched capable of rendering it possible to pronounce it *ultra vires*.

There is no possibility of holding a statute unconstitutional on the score that it interferes with the sphere of Executive authority, but on the other hand the Courts will not interfere by *mandamus*, or *certiorari*, or injunction or prohibition with the discretion of an officer to whom by law a discretion is entrusted,<sup>3</sup> though it will use its power to compel the doing of a purely Ministerial act where no discretion arises.<sup>4</sup> It will not attempt to require that in exercising his discretion any officer must take evidence or hear objections, unless this is a statutory obligation.<sup>5</sup> But it will consider whether any person falls within the sphere of those with regard to whom a discretion should be exercised, though with the exercise, e. g. refusal to grant a pension, it will not deal.<sup>6</sup>

The Legislature may freely give to Executive officers the duty of making regulations and deciding on the application of general rules laid down by Acts. This was held in *Baxter v. Ah Way* <sup>7</sup> and in *Welsbach Light Company of Australasia Ltd. v. The Commonwealth*.<sup>8</sup> But the Constitution would require amend-

<sup>1</sup> *Sendall v. Federal Commissioner*, 12 C. L. R. 664.

<sup>2</sup> Cf. *Federated Engine Drivers', &c. Association v. Broken Hill Prop. Co.* (1913), 16 C. L. R. 245. The Irish constitution opposes no difficulty ; see the *Land Act*, No. 11 of 1926, passed to prevent the Privy Council dealing with the Irish Courts' decision in *Lynam v. Butler*, [1925] 2 I. R. 82 (*J. C. L.* VIII. ii. 43).

<sup>3</sup> *R. v. Arndel* (1906), 3 C. L. R. 557 ; *R. v. Macfarlane* (1923), 32 C. L. R. 518.

<sup>4</sup> *R. v. Arndel*, 3 C. L. R. 557 ; *Kendall v. U. S.*, 12 Peters, 524.

<sup>5</sup> Contrast *Ex parte Walsh*, 37 C. L. R. 36.

<sup>6</sup> *Kerr, Austr. Const.*, p. 37 ; *U. S. v. Black*, 128 U. S. 40.

<sup>7</sup> (1908) 8 C. L. R. 626.

<sup>8</sup> (1916) 22 C. L. R. 268.

ment to permit the operation of the initiative and referendum, or the recall in any sense which would remove the intervention of the Parliament of the Commonwealth. It is, of course, perfectly legitimate to submit issues, such as the question of the adoption of compulsory service, to the people to decide, whereupon the Commonwealth Parliament might in the plenitude of its authority take such action as it thought fit.<sup>1</sup> But it is most doubtful whether the Parliament could ever bind itself to pass or repeal an Act which had been approved by referendum, leaving itself no freedom of action. The Canadian authority on the subject is indirect, and is far from conclusive even for a unitary Legislature,<sup>2</sup> and in the Commonwealth it may be pronounced inapplicable.

(k) *Trade and Commerce*

The doctrine of the reserved powers of the Commonwealth, now obsolete, insisted that the power to legislate on inter-State trade and external trade given to the Commonwealth reserved absolutely all regulation of intra-State trade to the States, and invalidated any Commonwealth legislation infringing this principle. It is clear that this doctrine cannot be invoked any longer,<sup>3</sup> and that invasion of the State sphere is legitimate, if essentially involved in the exercise of any federal power, just as it is in Canada. Similarly, the Commonwealth is not alone empowered to deal with inter-State or foreign trade, though the States are limited by their disability to impose customs duties, grant bounties, except as specially permitted, and by the prohibition of s. 92 to interfere with freedom of intercourse and trade between the States. It is further clear, also, in this differing from the United States constitution, that the Commonwealth can prohibit<sup>4</sup> no less than merely regulate, seemingly in this differing also from the Dominion.

Legislation under this power by the Commonwealth includes the *Sea Carriage of Goods Act*, 1904, and the new Act of 1924, the *Secret Commissions Act*, 1905, the *Commerce (Trade Descriptions) Act*, 1905, the *Australian Industries Preservation Act*, 1906–10,

<sup>1</sup> Cf. for a State case, *Taylor v. A.-G. of Queensland*, 23 C. L. R. 457.

<sup>2</sup> See above, p. 304.

<sup>3</sup> *Engineers' Case* (1920), 28 C. L. R. 129.

<sup>4</sup> *Kerr, Austr. Const.*, p. 114. For the sense of the term 'trade and commerce', see *W. & A. McArthur Ltd. v. State of Queensland* (1920), 28 C. L. R. 530, 546 ff.

though, as has been seen, certain provisions of that Act are invalid, as not restricted to inter-State and foreign trade, and the *Spirits Act*, 1906-18. There remains still to be decided how far the Act can be used in order to regulate conditions of employment in inter-State or foreign trade; Griffith C.J.<sup>1</sup> indeed was convinced that the power in this respect amounted probably merely to prohibiting the engagement of persons in it, but this seems to be clearly too limited in scope. In the case of merchant shipping certainly the power has been far more widely exercised, in accordance with the normal interpretation given to such legislation in the United Kingdom.<sup>2</sup> Still, the matter remains one of very considerable obscurity and uncertainty.

The power to deal with navigation refers also, it is clear, to regulating trade on navigable rivers, but how far a river will be deemed navigable by the High Court has yet to be determined.<sup>3</sup>

There seems no ground for suggesting that any limitation rests on the power of the States to impose export duties, unless the Commonwealth should intervene by paramount legislation. As regards importation, it is clear that when the Commonwealth prohibits, or by imposing taxes permits, State legislation would be unavailing, for it would be overpowered by the paramount power of the Commonwealth to prohibit or raise revenue.

#### (l) *Taxation*

The Commonwealth powers as to customs and excise have been considered in a number of cases. It is clear that excise is to be understood as the sort of duty which compares closely with customs, being levied on goods produced in the country in accordance with their quality or value, and not in a more extended sense so as to cover licence duties.<sup>4</sup> The justification for this view of the term is that the meaning of excise in Australian practice, when the Constitution was drafted, was of this kind, and there is no indication that any wider meaning was contemplated, while such a wider meaning would be a considerable

<sup>1</sup> *Australian Steamships Ltd. v. Malcolm* (1915), 19 C. L. R. 298, 307; *contra* Isaacs J. at p. 331.

<sup>2</sup> *Newcastle and Hunter River Steamship Co. Ltd. v. A.-G. for the Commonwealth* (1921), 29 C. L. R. 357.

<sup>3</sup> Kerr, *Austr. Const.*, pp. 127-9.

<sup>4</sup> *Ibid.*, p. 139.

inroad on the State powers of taxation. Hence in *Peterswald v. Bartley*<sup>1</sup> the right to levy licence duties was recognized as appertaining to the States. In *R. v. Barger*<sup>2</sup> it was emphatically ruled by the High Court majority that an excise could not be imposed subject to a rebate conditional on the observance of satisfactory conditions of manufacture, but the validity of the case is not wholly certain since the decadence of the doctrine of reserved powers, though there seems to be a certain amount to be said for it, apart from that doctrine. As regards customs, it is clear that it can be supplemented by the power of taxation so as to cover a provision allowing a seller to add an increase of duty, and a buyer to deduce a decrease, after a bargain had been made.<sup>3</sup> It was pointed out that British practice allowed addenda of this kind to Customs and Excise Acts, thus meeting the requirements of s. 55 of the Constitution, which requires Taxing Acts to deal with their own subject alone. In November 1926 it was ruled that South Australia could not place a tax of 3d. a gallon on the sale of petrol or consumption of imported petrol, as these were virtually excise duties.

As regards taxation in general, it has been exercised by enacting income tax, land tax, estate duties, amusement tax, excess profits tax, and a tax of ten per cent. on notes of private banks, intended and effective as destroying their use. There can be no doubt that the motive of taxation or its effect must now be deemed irrelevant to the consideration of the validity of a tax. Thus in *Osborne v. The Commonwealth*<sup>4</sup> the Federal Land Tax was vainly objected to, because it was on the face of it rather a device for breaking up large estates, especially those of absentee owners, than a mode of raising revenue; the Court was clear that it was essentially an Act taxing land, so that motive or result was irrelevant. It ruled also that only one subject of taxation was dealt with, so that s. 55 was obeyed. In *Morgan v. Deputy Federal Commissioner of Land Tax*<sup>5</sup> it was held perfectly legitimate to provide that the shareholders in a company should be deemed to be joint owners of land held by the company, and to be liable, in respect of their ownership, to tax, and s. 55 was again vainly invoked against the Act. But

<sup>1</sup> (1903) 1 C. L. R. 497.

<sup>2</sup> (1908) 6 C. L. R. 41, 73, 74.

<sup>3</sup> *G. G. Crespin & Son v. Colac Co-operative Farmers*, 21 C. L. R. 205.

<sup>4</sup> (1912) 12 C. L. R. 321; cf. 36 C. L. R. 20.      <sup>5</sup> (1912) 15 C. L. R. 661.

in *Waterhouse v. Deputy Federal Commissioner*<sup>1</sup> the attack was more successful ; the clause assailed provided that, if a husband had transferred land to a wife or *vice versa*, the two should be deemed to be joint owners of the land, and the Court found no authority for enacting what might be false. Barton J. referred to the Privy Council decision in *Attorney-General for the Commonwealth v. Colonial Sugar Refining Co.*<sup>2</sup> as proving that the onus lay with the Commonwealth to show how under the head of land tax—which must be the total content of the Act, under s. 55—there could be found authority for effecting a change in ownership. A further assault was made in *Attorney-General for Queensland v. Attorney-General for the Commonwealth*<sup>3</sup> on the validity of the *Land Tax Assessment Act*, 1910–14, on a variety of grounds, including the view that in taxing leasehold lands there was interference with the right of the States to regulate the management of the waste lands under Imperial Act ; that the tax was imposed on the property of the State, contrary to s. 114 ; and that the doctrine of immunity of instrumentalities was being violated. These grounds were all rejected ; Commonwealth taxation and State control were both compatible ; the tax was imposed not on property but on lessees in respect of their own property, and the case, even in the view of the upholders of the doctrine of immunity, did not fall within it.

The decision in *Waterhouse's* case above mentioned raised some difficulty on the consideration in *National Trustees, &c. Co. v. Federal Commissioner*.<sup>4</sup> The difficulty there was that the *Estate Duty Assessment Act*, 1914, contained the usual clause providing that a gift *inter vivos* within a year before death should rank as part of the deceased's estate for death duties. It was urged that, as this Act was to be read as one with the *Estate Duty Act*, 1914, there arose the sin against s. 55 of combining two forms of taxation, one on the estate of the deceased, and another on property not his at all. This was rejected by the Court, on the score that investigation showed that taxation of this composite kind was quite normal in 1900, when the Constitution was enacted, and must be held to be one subject of taxation. *Waterhouse's* case was with some difficulty dis-

<sup>1</sup> (1914) 17 C. L. R. 665.

<sup>2</sup> [1914] A. C. 237.

<sup>3</sup> (1915) 20 C. L. R. 148 ; leave to appeal was refused by the Privy Council, (1916) 22 C. L. R. 322.

<sup>4</sup> (1916) 22 C. L. R. 367.

tinguished ; it is clear that there was no such authority for the form of taxation in that case as that in the case of estate duties. The system of death duties, it may be noted, is that duty is charged on all real estate, and on all personal estate in addition, of any testator dying domiciled in Australia, but on personal property in Australia only in the case of one not domiciled.

The income tax of the Commonwealth did not escape examination in *Harding v. Federal Commissioner of Taxation*,<sup>1</sup> where s. 55 was once more adduced to seek to discredit the tax on the score that one provision created an income of five per cent. of the value of property occupied rent free. This effort at narrowing the idea of one tax again failed.

The exemption in s. 114 of property of the Commonwealth from taxation by the States is exemplified in *Municipal Council of Sydney v. The Commonwealth*,<sup>2</sup> when the right of the Council to levy rates on Commonwealth property was negatived. It was held that, while the section permitted levy with the consent of the Parliament, that consent should be evidenced by an Act or an appropriation to meet the rates, and that, as the State could not levy, it could not empower a municipality to do so. On the other hand, in *D'Emden v. Pedder*,<sup>3</sup> the effort to say that imposing a stamp on a receipt was taxing the property of the Commonwealth was rejected, on the score that the receipt could hardly be taken to be property within the meaning of s. 114. As we have seen, efforts to make use of the power in favour of the States have been failures. In the case of the importation of wire netting for sale to farmers, and of steel rails for use on State lines alike, the High Court<sup>4</sup> denied exemption from the taxing power, though on the very unconvincing ground that the tax was imposed on importation, which on the American view is heretical. Similarly, as has been seen, the plea failed in the case of federal land tax levied on leaseholds held from the State.

#### (m) *The Execution of Federal Laws*

In 1925 the Federal Parliament was compelled to legislate<sup>5</sup> to provide for the appointment of Peace Officers to execute its

<sup>1</sup> (1917) 23 C. L. R. 119.    <sup>2</sup> (1904) 1 C. L. R. 208.    <sup>3</sup> (1904) 1 C. L. R. 91.

<sup>4</sup> *The King v. Sutton* (1907), 5 C. L. R. 789 ; *A.-G. for New South Wales v. Collector of Customs* (1908), 5 C. L. R. 818.

<sup>5</sup> *Peace Officers Act*, 1925, No. 12. See *Parl. Deb.*, 1925, pp. 1875 ff., 1950 ff., 1971 ff. It was carried under a declaration of urgency and allotment of time (p. 1978).

laws. In justification of this action it was pointed out that on three occasions the Commonwealth had found State Governments defying the obligation of s. 5 of the Constitution Act, and failing to carry out the laws of the Commonwealth. One instance happened during the war, when the Premier of Queensland sought to prevent the operation of the War Precautions Act by forbidding the police of the State to act on it. The immediate cause of the measure, which had then been threatened by Mr. Hughes, but not proceeded with, was the refusal of the Government of Western Australia to afford protection to the Commonwealth customs, quarantine, and postal officers who desired to board an incoming vessel, thus allowing a miserable gang of youths to forbid their entry into the necessary launch, while the Government of the State—a Labour one—with cowardly folly refused to assert its authority, lest it be accused of taking sides, and lose some popularity. Further, the Government of New South Wales refused to lend aid to the federal authorities to carry out proceedings against Messrs. Walsh and Johannsen under the *Immigration Act*, No. 7 of 1925, just passed. It may be noted that, as the Act was held *ultra vires* by the High Court, the Labour Government of New South Wales was able to protest that it had acted strictly within its rights, in declining to allow its officers to take part in an illegal proceeding against men guilty of no offence. It may be added that a very difficult situation would have arisen, had the New South Wales Government adopted the advice given by a bellicose Senator, who recommended it to use the police force of the State to protect from illegal arrest under an illegal Act the champions of the seamen. It is, however, clear that the State Government ought to have allowed its officials to be used for the formal steps necessary to bring the matter into Court, for the Court, not the Government, is the proper authority to decide whether a law is constitutional or not, and no damage of any kind was suffered by those cited in defending themselves in Court.

On the other hand, it must be said that the Commonwealth Government has not shown itself at all anxious to afford the assistance it owes under the constitution to States which are driven by domestic violence to appeal to it for protection. The Commonwealth seems to hold the view that it is entitled to

decide for itself the merits of such an application, an opinion for which there seems to be no satisfactory ground of any kind. But it is clear, from experience in Queensland and Victoria,<sup>1</sup> that the best security for a State is a firm Government backed by legislation on the British model of 1920 (c. 55).

### § 6. *The Judiciary*

The ideal of a Court of Appeal for the Australian Colonies was mooted formally in 1849, when the Secretary of State meditated securing the presence of federal clauses in the Act of 1850 to create Victoria, and in 1870, as the outcome of a Commission in Victoria, it was further investigated, but the Imperial Government held that the matter was in no wise pressing. In the *Federal Council of Australasia Act*, 1885, nothing was inserted as to a Supreme Court, but in the 1891 Convention such a Court was taken for granted as essential, and thereafter formed the subject of elaborate investigation until its powers were finally embodied in the Constitution. Since then they have been explained, within the limits allowed by the *Judiciary Act*, by the *High Court Procedure Act* and the Rules of the High Court.

By s. 71 the federal jurisdiction of the Commonwealth is vested in a High Court, in such other Federal Courts as the Commonwealth creates, and in such State Courts as it invests with jurisdiction. Section 72 provides for tenure subject to removal on addresses from both Houses during the same session for removal on the ground of proved misbehaviour or incapacity, and this tenure applies to all federal justices. It follows, therefore, that the Inter-State Commission<sup>2</sup> and the Court of Conciliation and Arbitration<sup>3</sup> are not Courts of federal jurisdiction within the meaning of the Constitution, and cannot enforce their findings by injunction or otherwise, because in both cases

<sup>1</sup> See the *Public Safety Preservation Act*, 1923, No. 3292. For the police strike of November 1923, see *Round Table*, xiv. 385-91; as usual, the Federal Government was inactive. Contrast Canada in the case of Nova Scotia in 1924-5; c. 57 of 1924 lays down a simple procedure enabling a Premier to secure aid on repayment of cost, on the requisition of the Attorney-General to the district officer commanding, based on a notification of a judge of a superior, county, or district Court.

<sup>2</sup> *State of New South Wales v. The Commonwealth* (1915), 20 C. L. R. 54.

<sup>3</sup> *Waterside Workers' Federation v. J. W. Alexander Ltd.*, 25 C. L. R. 434.



the judges do not comply with the tenure laid down in s. 72. The High Court consists of a Chief Justice and at least two—there are six<sup>1</sup>—other Justices. To decide constitutional issues a full Bench must sit, unless at least three concur in the decision. Appeals from Supreme Courts of the States as full Courts are heard by three Justices at least ; other cases on appeal by two at least. A majority decides ; if there is equality, a decision of a Justice of the High Court, or of a State Supreme Court, or of a Judge of such a Court is affirmed, while if the judgement is that of an inferior Court the senior Justice prevails. The High Court is not bound to follow its own decisions as is the House of Lords ; it can, like the Privy Council, in case of necessity correct earlier errors,<sup>2</sup> since to refuse to do so would be to substitute the mistaken views of Justices for the fundamental law of the land. As in the United States, it is reluctant to interpret State Acts otherwise than as interpreted in the Supreme Court of the State, save, of course, on appeal from the Court or from another Court on a statute involving the same words.<sup>3</sup> It differs, of course, vitally from the Supreme Court of the United States in that it is an ordinary Court of Appeal from State Courts in their State jurisdiction. It is bound by decisions of the Privy Council, save, on its own view, in cases where it has refused to certify that a cause is fit for decision by the Council. It normally agrees with decisions of the Court of Appeal in England, but may deviate from them if it desires.<sup>4</sup> The Supreme Courts are bound by its decisions, save where they deviate from those of the Privy Council.

The High Court has original jurisdiction<sup>5</sup> both by the Constitution itself under s. 75 and by federal legislation authorized by s. 76. The former extends to matters as to treaties and consuls ; where the Commonwealth is a party ; between States, or residents of different States, or a State and a resident of another State ; and where an injunction, *mandamus*, or prohibition is sought against a federal officer. The latter gives juris-

<sup>1</sup> Act No. 31 of 1912, s. 2.

<sup>2</sup> *Engineers' Case* (1920), 28 C. L. R. 129.

<sup>3</sup> *Bond v. The Commonwealth* (1903), 1 C. L. R. 13.

<sup>4</sup> *Brown v. Holloway*, 10 C. L. R. 89, dissents from *Earle v. Kingscote*, [1900] 2 Ch. 585 ; *Seroka v. Kattenburg*, 17 Q. B. D. 177.

<sup>5</sup> For the distinction, see *The Commonwealth v. New South Wales* (1923), 32 C. L. R. 200.

diction in matters arising under the Constitution or involving its interpretation ; of Admiralty and maritime jurisdiction ; trials of indictable offences against the Commonwealth laws ; and matters involving the powers *inter se* of the Commonwealth and a State or States, or of two or more States. The Court has also authority under s. 33 of the *Judiciary Act* to make orders, or direct the issue of writs commanding a Federal Court to act ; prohibiting a Court from exercising federal jurisdiction which it does not possess ; commanding federal officers to act ; of ouster of office ; of *mandamus* ; and of *habeas corpus*. The State Courts are invested normally with concurrent federal jurisdiction, but this does not apply to cases of treaties ; suits between States or the Commonwealth and a State ; applications for writs of *mandamus* or prohibition against federal officers ; State Supreme Courts—not others—are excluded from jurisdiction in cases involving the question of the powers *inter se* of the Commonwealth and a State, or two or more States.

The Court is not vested with power to decide finally, or in any legal sense, hypothetical questions which cannot be brought under the conception of the judicial power as expressed in the Constitution.<sup>1</sup>

The Constitution gives jurisdiction to the Court over both States and Commonwealth in regard to disputes between them, such disputes being such as appertain to the sphere of private rights, e. g. ownership of property or tort, or neglect of some duty laid down in the Constitution.<sup>2</sup> Thus the Court has jurisdiction if a State seeks to raise forbidden taxes or maintain military forces, while equally the Court would have jurisdiction at the suit of a State over the Commonwealth if it taxed State property. Further, the Attorney-General can bring an action in the High Court to have declared invalid any State law which violates the Constitution. Suits between residents of different States are not available<sup>3</sup> when one of the residents is a corporation, and residence in different States must be proved strictly.<sup>4</sup> This jurisdiction is indeed manifestly otiose, and accidental

<sup>1</sup> *In re Judiciary Act* (1921), 29 C. L. R. 257 ; *Luna Park Ltd. v. Commonwealth* (1923), 32 C. L. R. 596.

<sup>2</sup> *The Commonwealth v. New South Wales* (1923), 32 C. L. R. 200 ; *South Australia v. Victoria* (1911), 12 C. L. R. 667.

<sup>3</sup> *Australasian Temperance &c. Society v. Howe* (1922), 31 C. L. R. 290.

<sup>4</sup> *Dahms v. Brandsch*, 13 C. L. R. 336.

rather than necessary, being borrowed from the United States constitution.

The exclusion of State Supreme Courts from dealing with any issue affecting the powers *inter se* of the Commonwealth and a State, or of two or more States, is accompanied by the rule that such a case, when it turns up in the Supreme Court, is to be removed forthwith without any order to the High Court, thus going far beyond the power of that Court to order the removal to itself of any case in a State Court involving the interpretation of the Constitution.<sup>1</sup> If, however, a Court can decide a case without dealing with the constitutional issue, it is proper for it to do so,<sup>2</sup> and save the High Court taking up the constitutional question, and on the other hand a Court must not decide an issue subject to the decision on the constitutional question, for if that must be decided, the case must be removed at once to the High Court. It is necessary that there should be the questions of powers *inter se* involved ; if not, then the case cannot be dealt with in this way by the High Court, and in *Hogan v. Ochiltree*<sup>3</sup> it was held that no constitution issue of this kind arises because a State Act seeks to undo the effect of a judgement of the High Court as to the title to occupy land, since the Legislature has a perfect right to alter ownership. In *Lee Fay v. Vincent*<sup>4</sup> it was held that the question whether the *Factories Act* of Western Australia discriminated between residents of the States and so offended against s. 117 of the Constitution was not really a question of the powers *inter se* of State and Commonwealth, but, as it was a matter affecting the interpretation of the Commonwealth Constitution, on which under s. 18 of the Judiciary Act the State Court could have submitted a point of law to the High Court, the case was treated as if the Supreme Court had so referred it.

The right to exercise the power of prohibition is one which is not an appellate right, and, therefore, is not subject to the general power of Parliament to limit appeals from Courts below, and the Conciliation and Arbitration Act cannot by s. 31 (1) take away from the High Court power to prohibit proceedings

<sup>1</sup> *George Hudson Ltd. v. Australian Timber Workers' Union* (1923), 32 C. L. R. 413 ; *Pirrie v. McFarlane*, 36 C. L. R. 170 ; cf. 37 C. L. R. 393 ff.

<sup>2</sup> *The King v. Maryborough Licensing Court* (1919), 27 C. L. R. 249.

<sup>3</sup> (1910) 10 C. L. R. 535.

<sup>4</sup> (1908) 7 C. L. R. 389.

beyond the jurisdiction of the Court of Conciliation and Arbitration.<sup>1</sup> This agrees incidentally with the High Court's ruling on appeal in *Clancy v. Butchers' Shop Employees*<sup>2</sup> that a State Act was inadequate to prevent prohibition for excess of jurisdiction being available to the Supreme Court against the Arbitration Court of that State. Prohibition will lie to any tribunal, but not to a mere advisory body such as the Board, under the Immigration Act, which guides the Minister in his decisions as to deportation of immigrants.<sup>3</sup> In its jurisdiction the Court will not deal with hypothetical cases, where its decisions will have no immediate concrete results. But an allegation that the plaintiff's trade will be ruined if an Act of a State is valid,<sup>4</sup> or a trespass on the legislative sphere of the Commonwealth, are cases appropriate for decision.<sup>5</sup>

As regards appellate jurisdiction, the Court is given, subject to such exceptions and regulations as Parliament may provide, power to hear and determine appeals from all judgements, decrees, orders and sentences of any Justice exercising the original jurisdiction of the Court ; or any other Federal Court<sup>6</sup> or Court exercising federal jurisdiction ; and of the Supreme Court of any State or any Court of a State from which, at the establishment of the Commonwealth, appeal lay to the Crown in Council. In the case of appeals from the High Court itself there is no restriction, save that the leave of the Court below is required for an appeal as to costs, and of the High Court in criminal cases. From the Supreme Court of a State in all instances, whether federal or not, an appeal lies when the amount at issue is of at least £300 in value ; or affects status under the laws as to aliens, marriage, divorce, bankruptcy and insolvency ; or when leave is given by the High Court ; or when the decision is one in a matter pending in the High Court, and is pronounced under the federal jurisdiction of the State Court. In the cases where State Courts other than the Supreme Court exercise federal jurisdiction under the powers conferred by s. 39 of the *Judiciary Act*, an appeal lies to the High Court in every case

<sup>1</sup> *Tramways Case* (No. 1), 18 C. L. R. 54.

<sup>2</sup> (1904) 1 C. L. R. 181.

<sup>3</sup> *R. v. Macfarlane* (1923), 32 C. L. R. 518.

<sup>4</sup> *W. & A. McArthur Ltd. v. State of Queensland* (1920), 28 C. L. R. 530.

<sup>5</sup> *The Commonwealth v. Queensland* (1920), 29 C. L. R. 1.

<sup>6</sup> e. g. the Central Court of New Guinea ; *Mainka v. Custodian of Expropriated Property* (1924), 34 C. L. R. 297 ; but see 37 C. L. R. 432.

in which an appeal lies from that inferior Court to the Supreme Court ; or special leave may be granted by the High Court ; which thus is assured of absolute power to hear appeals in federal jurisdiction.

It is clear that the wide terms of the Constitution involve some inconvenience. Thus s. 73, while giving powers to the Parliament to make exceptions to the rule of appeals, expressly lays down that ' no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which, at the establishment of the Commonwealth, an appeal lies from such Supreme Court to the Queen in Council '. It is clear that an appeal lay by special leave from the Supreme Court in any aspect, and thus the High Court can hear appeals from a single Judge sitting in Chambers,<sup>1</sup> without any intermediate appeal to the Supreme Court. This is an arrangement which imposes needless labour on the High Court, and diminishes its status as well as that of the Supreme Courts. A further result of the wide terms of s. 73 in giving, though subject to Parliamentary intervention, an appeal from any Court from which, at the establishment of the Commonwealth, an appeal lay to the Crown in Council, was seen in *Kamarooka Gold Mining Co. v. Kerr*,<sup>2</sup> when the company desired to appeal direct to the High Court from the Court of Mines in Victoria. It was clear that such an appeal was competent, since an appeal lies by statute of 1844 from any Court in the Dominions to the Privy Council by special leave, unless expressly taken away by Imperial Act, but the High Court very sensibly ruled that it would not hear the appeal, since there was an appeal to the Supreme Court, though it might have done so had there been no such appeal.

The Parliament is specifically empowered, by s. 77 of the Constitution, to define the powers of Federal Courts other than the High Court, to determine how far the jurisdiction of Federal Courts shall exclude that of State Courts, and to invest any State Court with federal jurisdiction. This is clearly validly executed by the *Judiciary Act* which altered vitally the position of the State Courts. These had up to then been exercising federal jurisdiction under s. 5 of the Constitution Act, which

<sup>1</sup> *O'Connor v. Quinn* (1911), 12 C. L. R. 239.

<sup>2</sup> 6 C. L. R. 255.

made the Constitution and federal laws binding on all States and Courts and people, but under the *Judiciary Act* their federal jurisdiction became limited and defined. But the Parliament made one illegitimate attempt; it enacted in s. 39 (2 a) that every decision, in its federal jurisdiction, of the Supreme Court, or any Court in a State from which an appeal lay at the establishment of the Commonwealth to the Crown in Council, should be final and exclusive, except so far as an appeal might be brought to the High Court. There is no doubt that this cannot be held to bar the right of appeal to the Privy Council in all such cases, both by special leave—as indeed the High Court was driven to admit—but also as of right, under the Orders in Council. The Privy Council, by hearing *Webb v. Outtrim*<sup>1</sup> and holding that the right of appeal there was valid, has proved, if argument were needed, that from a State Court, whatever the jurisdiction, appeals lie under the Orders in Council, whatever the *Judiciary Act* prescribes, and an attempt by Mr. Deakin in 1910 to induce the Imperial Government to alter the Orders in Council so as to make them apply only to State jurisdiction was unsuccessful, the President of the Council agreeing that to do this would be to violate the constitutional and legal position.

An analogous question is whether the Parliament could, if it wished, deprive as suggested in *Hannah v. Dalgarno*<sup>2</sup> the High Court of appellate jurisdiction in federal cases from the Supreme Courts, despite the proviso above cited of s. 73, on the score that federal jurisdiction being new, no appeal from it did exist at the establishment of the Commonwealth. The contention appears unsound, but the matter is little likely to be tested practically.

On the other hand, the High Court has, on the analogy of the Privy Council's action, declined to admit electoral appeals from a Court of disputed returns,<sup>3</sup> from a judge as a *persona designata* under the South Australian *Land Clauses Consolidation Act*, 1881,<sup>4</sup> or the Court of Industrial Arbitration in Queensland.<sup>5</sup>

<sup>1</sup> [1907] A. C. 81; *contra*, 35 C. L. R. 69; 37 C. L. R. 393.

<sup>2</sup> (1903) 1 C. L. R. 1.

<sup>3</sup> *Holmes v. Angwin* (1906), 4 C. L. R. 297. So in Canada, *North Huron Election Case* (1925), 29 O. W. N. 277.

<sup>4</sup> *C. A. Macdonald Ltd. v. South Australian Railways Commissioner* (1911), 12 C. L. R. 221.

<sup>5</sup> *Mutual Life and Citizens' Assurance Co. v. Thiel* (1919), 27 C. L. R. 187.

It appears also that an appeal does not lie from a verdict of a jury, nor a judgement based on such a verdict, though on this subject there has been much variation of opinion. In *R. v. Snow*<sup>1</sup> a Judge of the Supreme Court of South Australia, in a case of alleged trading with the enemy, told the Court to return a verdict of not guilty, and it was disputed if an appeal lay from his direction, or the verdict given by the jury in accordance with his direction. Griffith C.J., Gavan Duffy and Rich JJ. held that it did not, Isaacs and Higgins JJ. that it did, and Powers J. that it did, but that leave was not desirable in such a case. In criminal matters, though the Privy Council example is not binding on the High Court, which admittedly exercises a statutory jurisdiction and not the wide prerogative jurisdiction of the Council, it follows on the whole the principle of admitting appeals only when there is reason to think that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done. Leave to appeal in such causes is entirely a matter of discretion,<sup>2</sup> and will be granted when questions of great public importance are involved. It is no bar to an appeal from an acquittal that the prisoner is at liberty,<sup>3</sup> but, even when an acquittal is upset, the appellant may be made to pay the costs as a term of being allowed to appeal, if this course is just. In *Ross v. The King*<sup>4</sup> stress was laid especially by Isaacs J. on the wider power of the High Court to hear criminal appeals when justice demanded, and it is in fact clear that the difficulties of distance which preclude the Privy Council from being anxious to intervene are much less important in Australia itself, while the Council has recorded the fact that its reluctance is largely motivated by inconvenience and inexpediency.

In granting special leave in civil cases the Court observes the Privy Council rule in *Prince v. Gagnon*,<sup>5</sup> and grants leave only when 'the case is of gravity, involving matter of public interest or some important question of law, or affecting property of considerable amount, or where the cause is otherwise of some

<sup>1</sup> (1915) 20 C. L. R. 315; *Menges v. The King* (1919), 26 C. L. R. 369.

<sup>2</sup> Kerr, *Austr. Const.*, pp. 278 ff.

<sup>3</sup> *A.-G. for New South Wales v. Jackson*, 3 C. L. R. 730.

<sup>4</sup> (1922) 30 C. L. R. 251.

<sup>5</sup> (1883) 8 App. Cas. 103; *Hannah v. Dalgarno* (1903), 1 C. L. R. 1.

public importance or of a very substantial character'. But, even if a case be of a substantial character, of public interest, and involve an important question of law, the High Court, like the Privy Council, will not grant leave if the decision of the Court below appear manifestly sound,<sup>1</sup> or an abortive step to appeal to the Privy Council has been taken.<sup>2</sup>

The effect of the *Judiciary Act* as regards appeals from State Supreme Courts as of right is that the limit of value of the matter in dispute is fixed at £300, while in the Orders in Council for the appeal from the States to the Privy Council it is normally £500. There is a possibility of alternative appeals in each case of a decision of a State Court in the exercise of its jurisdiction Federal or State, and both sides might appeal, one to the Privy Council, one to the High Court, as has happened in Canada.<sup>3</sup> The High Court follows much the same principles as the Privy Council in deciding the issue what makes a value of £300; e. g. a defendant who had only been ordered to pay £100 cannot appeal as of right,<sup>4</sup> nor a plaintiff who has been awarded £500 out of a claim of £600.<sup>5</sup> An appeal lies from a State Supreme Court in a case of *habeas corpus*.<sup>6</sup> In *In re McCawley*<sup>7</sup> the Court held that it could not regard as a judgement a refusal of the Supreme Court of Queensland to admit as a member of that Court Mr. McCawley, whose commission was ruled by the Court illegal. The Privy Council, on the other hand, in its wider power, heard the appeal and ruled that Mr. McCawley had been duly appointed. The High Court cannot hear new evidence, but may remit the matter to the Court below to take evidence afresh; it cannot, moreover, set up a new case for a party not suggested in the Court below. The provision made by the *Judiciary Act* authorizing the High Court to require execution of its judgements on appeal by the Supreme Courts is valid, and is available to forbid the Court below to grant an adjournment or stay of execution, pending appeal to the Privy Council, even

<sup>1</sup> *Ex parte Spencer*, 2 C. L. R. 250; *John v. City &c. Society*, *ibid.* 186.

<sup>2</sup> *Smith's Weekly Publishing Co. v. Myerson* (1924), 34 C. L. R. 141.

<sup>3</sup> Clearly, in such a case, proceedings would be stayed in the inferior Court, if need be.

<sup>4</sup> Cf. Kerr, *Austr. Const.*, pp. 265 ff.

<sup>5</sup> *Jenkins v. Lanfranchi* (1910), 10 C. L. R. 595.

<sup>6</sup> *A.-G. for the Commonwealth v. Ah Sheung* (1907), 4 C. L. R. 949.

<sup>7</sup> (1918) 24 C. L. R. 345; 28 C. L. R. 106 (P. C.).

<sup>8</sup> *Bayne v. Blake*, 5 C. L. R. 492; *McBride v. Sandland*, 25 C. L. R. 369.



when it appears that such stay is necessary to prevent defeat of the appeal. This is based on the view that the judgements of the High Court are *prima facie* not subject to appeal.

As a result of the *Judiciary Act* State Courts have federal jurisdiction in matters affecting consuls ; between residents of different States or residents of one State and another State ; where an injunction is sought against a Commonwealth officer ; arising under the constitution or involving its interpretation ; arising under any laws made by Parliament ; of Admiralty and maritime jurisdiction ; or concerning any matter claimed under the laws of more than one State. The Supreme Courts have in addition powers to hear claims against the Commonwealth on contract or in tort, while claims against the States may be brought in the High Court or the Supreme Court. The State Courts are excluded from jurisdiction in cases arising under treaty ; claims between the States or a State and the Commonwealth ; *mandamus* or prohibition to a federal officer, and, in the case of the Supreme Courts, matters involving the limits *inter se* of the powers of the Commonwealth and the States or two or more States. State federal jurisdiction is not to be exercised in a Court of Summary Jurisdiction, save by a Stipendiary, Police, or Special Magistrate, or some Magistrate authorized by the Governor-General. In *Ah Yick v. Lehmert*<sup>1</sup> it was made clear that, when a State Court had federal jurisdiction, then appeal lies from it to higher State Courts in the same manner as if it were exercising State jurisdiction, apart from the appeal to the High Court.

Section 79 of the Constitution confers on the Commonwealth the power to make laws, conferring the right to proceed against the Commonwealth or a State on matters within the limits of the judicial power. Section 56 of the *Judiciary Act* allows suits in contract or tort to be brought against the Commonwealth in the High Court or the Supreme Court of the State in which the claim arose. A State may similarly sue the Commonwealth in the High Court. By s. 58 any persons having a claim against a State in respect of a matter in which the High Court has, or may have, original jurisdiction conferred upon it may sue, whether on contract or in tort, the State in the High Court, if it has original jurisdiction, or if not, in the Supreme Court of

<sup>1</sup> (1904) 2 C. L. R. 593.

the State. Section 59 again gives the High Court jurisdiction in suits by one State against another, and ss. 64 and 65 provide that in suits of this kind the rights of the parties and the remedies shall be as nearly as possible the same as in a suit between subject and subject, save that execution shall not issue against the Commonwealth or a State.

The effect of these remarkable provisions is illustrated by *Baume v. The Commonwealth*,<sup>1</sup> where it was held that a subject has the right to sue the Commonwealth in tort for any wrongful action, and not, as in England,<sup>2</sup> merely the individual offender, the Crown being exempt under the maxim, 'the Crown can do no wrong'. Moreover, the Commonwealth may be required to answer interrogatories and make discovery of documents as if a private litigant. Moreover, in *Marconi's Wireless Telegraph Co. Ltd. v. The Commonwealth*<sup>3</sup> it was ruled that it was not sufficient for the Postmaster-General to object to inspection demanded by the company in order to decide if there were infringement of its patents, on the score of injury to the interests of the Commonwealth, but that the Court was entitled to decide if there was any probability of injury, and, in the absence of any *prima facie* evidence, it did order inspection. And when the Commonwealth desired to appeal to the Privy Council, it granted a stay only on terms that the Commonwealth should be liable for any loss resulting from the stay, if the case went against it.<sup>4</sup>

Under a State Act, *Claims against the Government and Crown Suit Act*, 1912, of New South Wales, provision is made for the appointment of a nominal defender to represent the Government. In *Williams v. Attorney-General for New South Wales*<sup>5</sup> an effort was made and held valid by the High Court for the Attorney-General to seek to establish a trespass by the Crown, though it was ruled that the trespass, the proposal to divert Government House from the purpose of a residence for the Governor, was not a trespass, there being no trust or charitable dedication established, and the management of the waste lands of the Colony being entrusted to the Crown in its right of the

<sup>1</sup> (1906) 4 C. L. R. 97. Contrast *Raleigh v. Goschen*, [1898] 1 Ch. 73.

<sup>2</sup> *Tobin v. The Queen*, 16 C. B. (N. S.) 310; *Entick v. Carrington*, 19 St. T. 1030; 43 T. L. R. 106, 733.

<sup>3</sup> (No. 2) 16 C. L. R. 178.

<sup>4</sup> (No. 3) 16 C. L. R. 384; cf. 36 C. L. R. 378. <sup>5</sup> 16 C. L. R. 404.

State. The Privy Council<sup>1</sup> upheld the view that there was no trespass, but, like the High Court, it held that the proceedings were not in order, seeing that while the claim purported to be made by the Crown in its Imperial aspect, there was at no time before any Court a representative of that interest, for the Attorney-General of the State could not be deemed to be able to represent the Crown in that aspect. On the other hand, in *Attorney-General for New South Wales v. Brewery Employees' Union*,<sup>2</sup> it was held by a majority of the High Court, Higgins J. dissenting, that the Attorney-General, as representing the public of the State, was the proper person to bring an action to determine the validity of part vii of the Commonwealth *Trade Marks Act*, 1905. In the New South Wales case, therefore, his appearance on behalf of the public to assert a right against the Government may be deemed justified in that aspect.

Section 118 provides that full faith and credit shall be given throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State. This wide power is based on United States models, and really effects nothing more definite than the recognition of the principles of private international law to the extent indicated in *Haddock v. Haddock*.<sup>3</sup> The Commonwealth has legislated under its express powers in the *State Laws and Records Recognition Act*, 1901, No. 5, and the *Service and Execution of Process Act*, 1901-24. Part iii of the latter Act provides for the endorsement of warrants in other States, and summary arrest; the offender may be discharged by a justice if the complaint appear too trivial or not made *bona fide*; otherwise the offender is returned. The power exists contemporaneously with the *Fugitive Offenders Act*, 1881, of the Imperial Parliament, part ii of which has been applied to the colonies of Australia. Part iv provides for the enforcement of judgements by mere registration in the Court of another State; this doubtless has the effect, as under the *Judgements Extension Act*, 1868, of allowing execution of judgements which would not, on the English doctrines of private international law, form a ground for an action.<sup>4</sup>

<sup>1</sup> *A.-G. for New South Wales v. Williams*, [1915] A. C. 513.

<sup>2</sup> (1908) 6 C. L. R. 469.

<sup>3</sup> 201 U. S. 562.

<sup>4</sup> See Dicey and Keith, *Conflict of Laws* (ed. 4), pp. 463 ff.

§ 7. *Finance and Trade*

The revenues of the Commonwealth are constituted into a Consolidated Revenue Fund charged with the cost of collection and thereafter with the expenditure of the Government, with the usual provision that no appropriation can be made from the Treasury except under a law. There were also the usual transitory provisions regarding the transfer of State officers to the Commonwealth, and their pensions on ultimate retirement, to which the States were to contribute, compensation at State expense to officers retired on federation, &c., over which disputes as to pension contributions have not been rare.<sup>1</sup> Elaborate provision was made under s. 85 as to the taking over by the Commonwealth of property used exclusively by the States in respect of transferred departments and of other property not exclusively so used. The question of fixing the compensation to be paid caused great difficulty, the Commonwealth being given power to legislate to decide the question, but no such legislation has been passed. Ultimately, it was agreed to value the properties, and the Commonwealth undertook payment of interest on the amount so arrived at.<sup>2</sup>

The Constitution provided for the imposition within two years of uniform duties of customs, in addition to transferring forthwith the control of customs and excise, and of the payment of bounties to the Executive Government. It also provided for the annual payment to the States by the Commonwealth of three-quarters at least of the net produce of customs and excise for a period of ten years. On the imposition of uniform duties of customs, the power of the Commonwealth as to customs and excise and the grant of bounties was made exclusive, subject to the rule (s. 91) that a State may grant a bounty on mining for gold, silver, or other minerals, and, with the permission by resolution of both Houses of Parliament, may give bounties on the production and exportation of other products. Further, on the imposition of uniform duties (s. 82), trade, commerce, and intercourse among the States are made

<sup>1</sup> *Willis v. Mackray*, [1910] A. C. 476; *New South Wales v. Commonwealth*, 6 C. L. R. 214; *Manton v. Williams*, 4 C. L. R. 1046; *Greville v. Williams*, 8 C. L. R. 760; *Cousins v. Commonwealth*, 3 C. L. R. 529; 36 C. L. R. 585.

<sup>2</sup> Cf. on the cost of federation, *Commonwealth Parl. Pap.*, 1910, No. 62; *Tasmania Parl. Pap.*, 1910, No. 50.

absolutely free. A number of transitory clauses provided for the first five years of the new régime, including the authority given to Western Australia to continue for that period her import duties. Then by s. 98 it was made clear that the commerce power under s. 51 (1) applied to navigation and shipping and to railways, the property of a State. Section 99 forbids the Commonwealth by any law or regulation of trade and commerce or revenue to give preference to any State, or part thereof, over any other State or part thereof. Section 100 adds a prohibition of the Commonwealth by any law of trade or commerce to abridge the right of a State, or the residents therein, to the reasonable use of the waters of rivers for conservation or irrigation.

The provision regarding the payment to the States of three-fourths of the net products of customs and excise, the ' Braddon blot ', was a compromise suggested at one time by Sir E. Braddon, and it was never popular, as it placed the Commonwealth in a burdensome position. In the *Surplus Revenue Act*, 1908, an ingenious device was adopted to put an end to the automatic handing over each year of the surplus by arranging for trust funds, payments to which should be deemed appropriations, though the money was not going to be spent in the financial year. Thus, in effect, the Government was enabled to accumulate funds for the important expenditures on defence and public works looming before it. It was sought to defeat the policy by claiming that it was illegal ; that the States must have the actual balance over all actual expenditures, and that appropriations were in this way not expenditure, since the Executive Government was not given any mandate to expend them in the year. The High Court ruled out this contention.<sup>1</sup>

This decision paved the way to a settlement of the issue of the future of State finances after the expiry of the ten years' limit fixed by the financial arrangement. It had been bound up at various times with the issue of taking over the State debts and paying for the transferred properties, and Sir G. Turner in 1904, Sir J. Forrest in 1906, Sir W. Lyne in April 1908,<sup>2</sup> and Mr. Fisher in March 1909<sup>3</sup> had all developed theories on the subject. Ultimately Sir J. Forrest, on becoming Treasurer in 1909, secured an agreement with the States on the basis

<sup>1</sup> *Parl. Deb.*, 1910, pp. 11810 ff.

<sup>2</sup> *Parl. Pap.*, 1908, No. 44.

<sup>3</sup> *Ibid.*, 1909, No. 48 ; cf. Nos. 23, 44, 59.

of the grant to each State of twenty-five shillings a head of population with £250,000 extra to Western Australia, the amount being taken from the others on a population basis. It was then decided to make the arrangement a part of the Constitution, while the Constitution was also to be altered to permit the taking over of the whole of the State debts. The necessary Bills passed both Houses, but, while the referendum of 1910 approved the provisions permitting taking over State debts, those as to the subsidies were rejected by New South Wales, Victoria, and South Australia, which objected to a permanent settlement, and the arrangement was ultimately passed as a simple Act, No. 8 of 1910. Section 96 of the Constitution permits the grant of aid specially to financially weak States, and in 1912 began the policy of thus aiding Tasmania, the Act No. 27 of 1924 providing for the payment of £55,000 over a period of five years in diminishing amounts, and also undertaking the payment of Commonwealth income tax on prizes won in the lotteries of Tasmania, whence that shameless State draws considerable profits, while the Federal post office refuses to deliver any letters to its authorities. Efforts to effect a new settlement of the issues have so far failed of success. The Federal offer of 1923 was to give up taxing incomes under £2,000, in return for cessation of the capitation allowances, certain special payments of £778,000 in all being made to Queensland, Tasmania, and Western Australia. This was viewed coldly by the States, which considered more favourably a suggestion that the Commonwealth should not tax individual incomes at all, and limit its tax on corporations to 2s. 6d. per £1. This proposal, however, was not definitely agreed upon, as New South Wales dissented, and in 1924-6 the matter was further postponed, and new proposals canvassed. On the other hand, it was agreed to arrange for State collection of Federal income tax,<sup>1</sup> save in the case of Western Australia, where Federal collection of State income tax already existed. It is clear that the finances of Western Australia are becoming more and more embarrassed, with annual deficits, totalling in 1925 almost six million pounds gross, while Tasmania cannot balance her budget even with the Federal grant. The raising of loans has been consolidated by

<sup>1</sup> The reform saved £200,000 a year and 600 officials to the Commonwealth, and different assessment forms to the public. See also App. D.

agreement, save as regards New South Wales, a Council representing the Federation and the States agreeing on the times and extent to which the Federation or any State shall approach the market for loans, whether in England or elsewhere. The result of this Board has been to prevent needless competition and resulting loss. The permission to take over the State debts has never been acted on, and in view of the growth of these debts under State trading, carried on often on a far from satisfactory financial basis, especially in Queensland, where it is strictly *à la mode* to juggle with figures in order to show a surplus, it is most improbable that the debts will be taken over at any early date.

The Constitution made provision for the establishment of an Inter-State Commission with functions of adjudication and administration in respect of the trade and commerce provisions of the Constitution. The Commission was essential, if the Parliament desired to exercise the power of forbidding discrimination by State railways, for no rate was to be deemed unreasonable unless held so by the Commission. By s. 104 nothing was to prevent the levying of a rate by a State railway, if the Commission considered it necessary for the development of the State, and no differentiation were made between goods within and coming into the State. The meaning of the strange proviso may be understood when it is remembered that, in the Queensland Act of 1893, it is recited how efforts were being made in an adjacent State to prejudice the use of the Queensland lines, and it is provided that a special tax shall be levied on all goods exported by railway. The Commission was duly created by Act in 1912, the members holding during good behaviour for seven years, with the possibility of reappointment, but the High Court held the creation of the Commission with the powers of a Court to issue injunctions invalid,<sup>1</sup> and, when the appointments expired, they were not renewed.

The Constitution recognizes that discrimination by the Commonwealth is definitely illegal. There must be uniformity in customs, in bounties ; taxation must not differentiate between States or parts thereof ; trade, commerce, and intercourse must be free (s. 92) with a saving for the case of intoxicating liquor ; and a general prohibition of preference regarding laws or

<sup>1</sup> *The State of New South Wales v. The Commonwealth*, 20 C. L. R. 54.

regulations of trade, commerce, or revenue, is, as above noted, contained in s. 99.

It is definitely ruled by the High Court<sup>1</sup> that s. 92 is addressed to the States, not the Commonwealth, for whose action other provision exists under ss. 51 (ii and iii), 88, and 99. But there is no diminution thereby of the right of eminent domain, and while, so long as any owner has property, he is entitled to export it, if it is taken from him by State action, then his right to export, which is based on his property, is *ipso facto* determined; thus it was held in *State of New South Wales v. The Commonwealth*.<sup>2</sup> On the other hand, it is impossible for New South Wales to forbid the export of meat from the State; this judgement, asserted in *Foggitt Jones & Co. Ltd. v. State of New South Wales*,<sup>3</sup> was overruled, quite wrongly, in *Duncan v. State of Queensland*,<sup>4</sup> but was replaced in *W. & A. McArthur Ltd. v. State of Queensland*.<sup>5</sup> That State had endeavoured to prevent the sale of any goods therein at prices beyond certain maxima, and it was ruled that as regards goods sold for delivery from New South Wales the law was invalid. Similarly, it is clear that a State cannot impose disabilities on the sale of goods from without the State, as, for instance, by imposing a lower licence duty in respect of the sale of local wines. It cannot prohibit the entry of goods, save liquor (s. 113), but it might forbid the sale of all such goods, including those produced locally, if any, and it is rather a moot point whether it could not forbid even the possession of goods deemed to be dangerous, though imported from some other State. Nor is it easy to say whether a State, which taxes all local companies on the amount of capital paid up, is bound to exempt companies formed in other States which merely enter the State in the sense of being engaged in inter-State trade.

The question of discrimination in taxation was raised in the *Excise Tariff Case*,<sup>6</sup> for as the conditions under which exemption was to be accorded to manufacturers of agricultural implements were to be determined by different authorities in the several States, it was contended that there might thus be differentiation,

<sup>1</sup> *W. & A. McArthur Ltd. v. State of Queensland* (1920), 28 C. L. R. 530, 556.

<sup>2</sup> (1916) 21 C. L. R. 357.

<sup>3</sup> (1915) 20 C. L. R. 54.

<sup>4</sup> (1916) 22 C. L. R. 556.

<sup>5</sup> (1920) 28 C. L. R. 530.

<sup>6</sup> (1908) 6 C. L. R. 41.



but this view was not accepted by the minority, who held that differentiation must be based on State character, if it were to be within the prohibition.

The view taken by the minority in that case was affirmed positively in *Cameron v. Deputy Federal Commissioner of Taxation*<sup>1</sup> when it was ruled that ss. 46 and 46 *a* of the *Income Tax Regulations*, 1917, were invalid, because in calculating the value of live stock it was provided that these should be rated at differing figures in the different States, e. g. a horse in New South Wales at £8, in Victoria at £15. This was held by the justices to be a clear case of differentiation by States, and disallowed. It was discriminated from cases where, by reason of the condition of things existing in the States, laws in themselves quite equal may operate to produce differential results, instances of which are furnished by one aspect of *Peterswald v. Bartley*<sup>2</sup> and *Colonial Sugar Refining Co. v. Irving*.<sup>3</sup>

### § 8. *New States*

Section 121 permits the Parliament to admit or establish new States on such conditions as it shall prescribe, and to provide for their representation in Parliament. It may also, with the consent of the Parliament of a State and the majority of the electors voting on the issue, increase, diminish, or alter the boundaries of a State, and make consequential provisions, a rule based on the similar power given in Canada by the Act of 1871. A new State may be formed out of the territory of a State, or out of two States, or parts of two States, in each case with the approval of the Parliament or Parliaments concerned. A State, however, by s. 111, may simply surrender a part of its territory to the absolute control of the Commonwealth, which then by s. 122 can legislate on any matter regarding it, as it can do also for any territory placed by the Crown under the Commonwealth and accepted by it, or otherwise acquired by it, and it can provide for the representation of any such territory in Parliament. In any alteration of the Constitution, under s. 128, the consent of the majority of the electors in any State at the referendum is essential to any change being carried varying the boundaries of the State.

<sup>1</sup> (1923) 32 C. L. R. 68. See *Income Tax Assessment (Live Stock) Act*, 1924, No. 33.

<sup>2</sup> (1903) 1 C. L. R. 497.

<sup>3</sup> [1906] A. C. 360.

One odd result comes from these provisions ; while the boundaries of a State are normally safeguarded, it can none the less by mere Parliamentary decision hand over any part of its territory, either for the purpose of being administered by the Commonwealth, or of being converted into a State. The Constitution clearly invalidates the application to the States of the *Colonial Boundaries Act*, 1895, a decision which seems to be open to serious exception,<sup>1</sup> and it remains uncertain how far the old provisions as to change of boundary contained in the Constitution Acts are in force. Thus the Act of 1850<sup>2</sup> allowed the Crown to alter the boundaries of New South Wales and Victoria ; that of 1855<sup>3</sup> permitted these Colonies by concurrent legislation to change their boundaries on the Murray River ; that of 1861<sup>4</sup> permits Governors of contiguous Colonies to settle the boundary in case of doubt, the boundary when proclaimed by the Crown to become binding ; and in 1890<sup>5</sup> power was given to annex one part of a Colony to another. There seems no conclusive reason to suppose that these Acts have been invalidated by the Commonwealth Constitution Act. It was indeed proposed in 1908 to use the Act of 1861 as a mode of deciding the disputed boundary between Victoria and South Australia, but Victoria declined ultimately to homologate the Premier's agreement to pay a certain sum in return for the surrender of the South Australian claim. The matter was ultimately decided by an action in the High Court, followed by an appeal to the Privy Council in favour of the boundary as established.<sup>6</sup>

The possibility of admission of New Zealand or Fiji as States may now be regarded as remote, but there is more likelihood of the creation of new States out of the great areas of Northern Australia, Queensland, and Western Australia. There have been agitations in northern and central Queensland,<sup>7</sup> in the south, north, and the goldfields of Western Australia,<sup>8</sup> and in September 1922 the movement took shape in New South Wales,

<sup>1</sup> Quick and Garran, *Const. of Commonwealth*, pp. 975 f.

<sup>2</sup> 13 & 14 Vict. c. 59, s. 30.

<sup>3</sup> 18 & 19 Vict. c. 54, s. 5.

<sup>4</sup> 24 & 25 Vict. c. 44, s. 5.

<sup>5</sup> 53 & 54 Vict. c. 26.

<sup>6</sup> *South Australia v. Victoria* (1911), 12 C. L. R. 667.

<sup>7</sup> See Bernays, *Queensland Politics*, pp. 506-34. These districts brought Queensland into federation, and the agitation for division has only been feebly present since.

<sup>8</sup> See Battye, *Western Australia*, pp. 424 ff., 447 f.

where a project to create a separate State out of the north has been encouraged by fairly wide support ; the Federal Government was informed that the State Assembly favoured the convening of a convention to consider boundaries and the redistribution of legislative authority. The Commonwealth pointed out that, if New South Wales desired the creation of a new State out of her territory, this could be arranged under the existing constitution. In April 1924 the New South Wales Government set up a Royal Commission which investigated, with negative results, the issue of creating new States. But it found that the burden of taxation on any new State would be crushing, and that the complaints of neglect as regards railways, ports, educational and medical services, and encouragement of rural industries were far from established, while the over-centralization of the towns was reckoned rather a feature of the national life than due to the single State system. A proposal for increasing local government by setting up District Councils with wider powers was mooted in lieu.

#### § 9. *Papua, the Federal Capital, and the Northern Territory*

The Constitution accords to the Commonwealth unfettered<sup>1</sup> power over territories which may be acquired by surrender by a State (s. 111), transfer by the Crown (s. 122), acquisition for the seat of Government (s. 125), or for public purposes (s. 51, xxxi), or as the result of the transfer of a public department (s. 85). It results hence that the terms of the Constitution fettering Commonwealth legislation have no application. Thus the rules of s. 55 as to Tax Acts dealing with one subject only need not be regarded, nor need trial on indictment in Papua be by a jury under s. 80,<sup>2</sup> and it is more than doubtful, according to *Mitchell v. Barker*,<sup>3</sup> whether a Court in the Northern Territory should be reckoned a Federal Court in the technical sense of the term used in Part iii of the Constitution.

##### (a) *Papua*

Papua represents the portion of New Guinea which was ultimately secured by the Crown in the struggle which was

<sup>1</sup> *Buchanan v. The Commonwealth* (1913), 16 C. L. R. 315 ; *The Commonwealth v. New South Wales*, 33 C. L. R. 1 ; *Porter v. R.*, 37 C. L. R. 432.

<sup>2</sup> *R. v. Bernasconi*, 19 C. L. R. 629.

<sup>3</sup> (1918) 24 C. L. R. 365.

begun in earnest by the effort of Queensland in April 1883, without Imperial authority, to annex all the island outside the portion already claimed by the Netherlands. The British Government ultimately consented in November 1884 to the declaration of a protectorate over the south-east part of the island, and in 1885 a Commissioner was appointed.<sup>1</sup> The indignation of the Colonies at German intervention was expressed at the Colonial Conference of 1887, at which the common-sense step was taken of the Colonies concerned agreeing to bear the expense of administration. Queensland, by Act No. 9 of 1887, provided a subsidy of £15,000, and accordingly annexation took place in 1888. The Imperial Government generously provided £52,000 for the cost of administration, and the local revenue, such as it was, was for a time returned *pro rata* of their contributions to New South Wales, Victoria, and Queensland. The administration was of Crown Colony type, with a nominee Legislative Council and an Executive Council of the ordinary type. The Lieutenant-Governor, however, corresponded through the Governor of Queensland, who thus was able to secure ministerial advice on the development of the territory, though the responsibility remained with the Secretary of State. On federation, letters patent of 18 March 1902 gave to the Governor-General the role hitherto occupied by the Governor of Queensland, and the Commonwealth provided £20,000 a year for the Colony. In 1905 the *Papua Act* was passed, and letters patent formally transferred the territory to the Commonwealth. The territory is not annexed to the Commonwealth, nor part of it; the case of *Strachan v. The Commonwealth*<sup>2</sup> shows the purely political character of the relation of the Commonwealth and Papua, and that officers of Papua did not become by the mere transfer officers of the Commonwealth, but to be made so must become so by Act.

The constitution given by the *Papua Act*, 1905-24, is of the old Crown Colony type. The Lieutenant-Governor is subject to the Governor-General acting on the advice of the Minister for Home and Territories; he is advised by an Executive Council of nine members, appointed by the Governor-General, eight officials and one non-official, who may be selected for

<sup>1</sup> *Parl. Pap.*, C. 3617, 3691, 3814 (1883); 3839, 3863 (1884); 4217, 4273, 4290, 4441, 4584 (1884-8); 4656 (1886); 5091.      <sup>2</sup> (1906) 4 C. L. R. 455.

appointment by the non-official members of the Legislative Council. That body comprises the Lieutenant-Governor, the official members of the Executive Council, and five non-official members nominated by the Lieutenant-Governor and appointed by the Governor-General. The Lieutenant-Governor may override his Council, but must report to the Minister his reasons for doing so. The Legislature has full powers, save that it may not place discriminatory duties on Commonwealth products, though there is no free trade with the Commonwealth. The Lieutenant-Governor may assent to Bills, but they may be disallowed in six months ; or he may reserve, in which case they lapse if not assented to in a year. He is required to reserve, unless they contain a suspending clause, Bills as to divorce ; disposal of Crown lands ; granting himself money ; interfering with treaty obligations or the Imperial forces ; or affecting the prerogative ; or the rights and property of persons outside the territory ; or the trade and shipping of any part of the Empire, if the measures are of an extraordinary character. Further, he may not assent to Bills dealing with native land, native labour, deportation of natives, the supply of arms, ammunition and liquor to the natives, the immigration of Asiatics, Africans, or natives of Australia or the Pacific islands. The judiciary is subject to an appeal to the High Court, and the prerogative of mercy may be exercised by the Lieutenant-Governor. Ten per cent. of the rents of leaseholds is entrusted to three trustees appointed by the Governor-General, to be devoted to the relief of indigent and infirm natives. The Commonwealth Parliament retains full legislative power, and scrutiny of all legislation on subjects which, under the Constitution, require reservation was made when the territory came under the Act. The revenue, being far short of the expenditure, is supplemented by Commonwealth grants, recently of £50,000 a year. The Constitution forbids grants of land in freehold, and requires reassessment of leasehold values from time to time. It also forbids the increase of liquor licences, affording machinery by polls which may result in extinction without compensation. Liquor may not be supplied to natives save gratis for medicinal purposes in case of necessity, the onus of proof being on the supplier.

*(b) The Federal Capital*

Under the Constitution the capital of the Commonwealth was to be in New South Wales, not nearer Sydney than 100 miles, and not less than 100 miles in extent. It was arranged in 1899 that, as part of the price to be paid for the assent of New South Wales to federation, it should not be further than necessary from Sydney.<sup>1</sup> In 1904 Dalgety was chosen by Act No. 7, but rejected in 1908 by Act No. 24, and after an exhaustive ballot in 1909 the Fisher Government passed an Act, No. 23, which fixed the site at Yass-Canberra, the name finally being fixed as Canberra. New South Wales surrendered the necessary area—some 900 square miles—by Act No. 14, including access to the sea at Twofold Bay. In 1915 the Commonwealth further acquired twenty-eight miles' area at Jervis Bay for possible use as a port, while the Australian Naval College was established at Captain's Point in the area.

By an Act, No. 25 of 1910, power was taken for the administration of the area, power to legislate being given to the Governor-General in Council. Ordinances so passed must be laid before Parliament not later than thirty days after, and may be disallowed on a resolution of either House proposed within fifteen days thereafter. The Commonwealth legislation as to conciliation and arbitration, secret commissions, and preservation of industries is applied. Land may not be disposed of in freehold; compensation for land acquired must be based on the unimproved value of land in October 1908 plus the value of improvements. The inferior Courts of New South Wales were accorded authority to exercise jurisdiction. In 1921, as the progress made by the two departments—Home and Territories, and Works and Railways—concerned was slow, an Advisory Committee was appointed, and in July 1923 the Parliament decided that in 1925, if possible, it should meet at Canberra. Work was then accelerated, and in 1924 Act No. 8 provided for the appointment of a Commission of three persons nominated by the Governor-General to undertake the municipal government of the area, to manage the land, and undertake a great programme of public works, tramways, gas, electric light, &c. In

<sup>1</sup> Turner, *Australian Commonwealth*, pp. 65–8, 73 f., 188 ff., 210, 244, 265, 268; *Parl. Pap.*, 1907–8, No. 18.

1926 the opening of Parliament at Canberra was finally arranged for 1927. The Commission has power to make by-laws, and to levy rates. Ultimately, Parliamentary representation will be accorded,<sup>1</sup> but for the time being that is impracticable, in view of the small population, a defect which may be remedied when the capital is definitely established as the home of the Parliament and Government. In the interim, the home of Parliament has been Melbourne, while the Governor-General has mainly divided his time between that city and Sydney, though the withdrawal of the use of Government House there in 1912<sup>2</sup> marked a certain hostility on the part of the Labour Government.

(c) *The Northern Territory*

South Australia was ready in 1907 to surrender the Northern Territory<sup>3</sup> to the Commonwealth, recognizing that her resources were wholly inadequate to secure any development. There were then, in the area of 523,620 square miles, only two railways, that from Port Augusta in South Australia to Oodnadatta and that from Darwin to Pine Creek, 146 miles, the intervening gap being about 1,200 miles; the European population was under 3,500, the aboriginal conjectural, perhaps 20,000, with a certain number of Chinese, 220 of whom were introduced in the seventies to promote agriculture, while others came during the gold rush. The idea of development of Indian indentured labour was at times mooted, but ultimately never carried into operation, despite the enactment of facultative legislation. The necessary Bill for the taking over of the territory was defeated in the Senate of the Commonwealth in 1909 by two votes, and Mr. Verran was returned to power in 1910 in the State on the understanding that the Act of 1907 would be repealed; he was, however, overruled by his colleagues, the Lower House refused to accept the Bill passed in the Council for repeal, and the Commonwealth enacted measures for the acceptance and

<sup>1</sup> For registration of Members of Parliament living at the seat of government, see Act No. 20 of 1925, s. 3. The High Court is not to go thither at present; see *Judiciary Act*, 1926; *Debates*, p. 2238.

<sup>2</sup> Keith, *Imperial Unity and the Dominions*, pp. 429-31.

<sup>3</sup> Assigned to South Australia by letters patent, 6 July 1863, under 5 & 6 Vict. c. 76, s. 31, and 24 & 25 Vict. c. 44, s. 2; *South Australia Parl. Pap.*, 1896, No. 113.

administration of the territory.<sup>1</sup> The consideration for the surrender was the relief of the State from the burden of debt contracted in respect of the territory, the understanding that the railway between Oodnadatta and Pine Creek, long contemplated, should be carried out, and that steps would be taken to complete the project of a transcontinental railway, which, running 1,051 miles from Port Augusta to Kalgoorlie in Western Australia, was completed in 1917. In that year the line from Pine Creek was extended to Emungalan on the Katherine River, while an Act of 1923 arranged for an extension of 160 miles, to Daly Waters. From 1 January 1925 the Oodnadatta line was taken over for working purposes from the Government of South Australia. The Act of acceptance further provided for freedom of trade between the territory and the Commonwealth.

The *Northern Territory (Administration) Act*, 1910, provided for the appointment of an Administrator with a merely advisory Council, and vested legislative power in the Governor-General in Council by ordinance, which must be laid before Parliament within fourteen days, and might be disallowed by either House on notice given not later than fifteen days thereafter. But the control of the Administrator was not extended to all departments ; railways, posts and telegraphs, customs taxation, public works and quarantine were removed from his management and entrusted to Commonwealth departments ; the judicial arrangements were supplemented by the establishment of a Supreme Court with original and appellate jurisdiction, from which appeal lay to the Supreme Court of South Australia. The usual rule of not parting with land on leasehold was laid down. But no great progress marked the taking over by the Commonwealth, and by 1926 the white population was put at 2,350, with about 1,050 non-Europeans, excluding aborigines, and 20,000 of the latter. It was determined, not unnaturally, to seek a new form of Government to aid development, in view in part of the grave

<sup>1</sup> Commonwealth *Parl. Pap.*, 1907, No. 4 ; 1909, No. 21 ; 1910, Nos. 22, 26 ; South Australia Acts Nos. 946 and 1029 ; *Council Deb.*, 1910, pp. 181 ff. ; *Ass. Deb.*, 1910, pp. 597 ff. ; Commonwealth *Parl. Deb.*, 1910, pp. 4423 ff., 4540 ff., 4633 ff., 4715 ff., 5010, 5094 ff., 5416 ff., 5552 ff. ; Acts No. 20 and 27 of 1910 ; No. 24 of 1919 ; No. 11 of 1923. For its representation by a member without vote in the House of Representatives, see Act No. 18 of 1922 ; No. 21 of 1925. For appeal to High Court, see 37 C. L. R. 432.



menace presented by so large an empty area, and in 1925 legislation was proposed but not passed owing to the hasty dissolution, but was taken up in 1926, passing as the *Northern Australia Act*. The scheme of the new Constitution is the division of the territory into two distinct areas, North Australia and Central Australia, the Administrator disappearing, but a Resident being appointed for each, to be advised by a Council of two nominated and two elected members, the election being on the Parliamentary franchise, which under an Act of 1922 has been employed to return to the Lower House of the Commonwealth a member entitled to speak but not—in view of the tiny electorate—to vote. But the most important feature of the scheme is the establishment of a Commission of three persons appointed by the Governor-General, who are charged with matters connected with development in the area north of 20° South latitude, including the maintenance and operation of railways, the construction and maintenance of roads, the erection of telegraph and telephone lines, water boring and conservation, ports and harbours, and such other matters as may be specified by the Governor-General in regulations made under the Act. The distinction is, then, between a body which is supposed to be capable of developing the country, though as regards railways its action is to be advisory, and the ordinary administration, which the Resident is to deal with by the aid of his Council, which is to hold office for three years with the possibility of re-election or renomination. The Council is given the new power of advising as to the enactment or repeal of ordinances.<sup>1</sup>

#### (d) *Norfolk Island*

This little island was occupied as a penal settlement from 1788 to 1813 and from 1826 to 1855, being annexed to Tasmania in 1844. In 1856 it became by statute a distinct settlement, which was placed under the Governor of New South Wales, who was also Governor of Norfolk Island, but by letters patent of 1897, under the Act 18 & 19 Vict. c. 56, s. 4, it was placed under

<sup>1</sup> Possibilities of other parts of Australia being added by consent of Western Australia and Queensland exist; see *Parl. Deb.*, 1926, p. 826. But Western Australia in 1926 definitely declined to surrender any territory for the time being, the success of the new scheme being awaited. The rule against sale of land was repealed by the *Northern Territory (Administration) Act*, 1926.

the Governor of New South Wales, and thenceforth administered at least nominally by the Government of the Colony through a Chief Magistrate.<sup>1</sup> In 1913, however, the Commonwealth passed an Act under which the island was entrusted to the Commonwealth. It is administered by an Administrator and Chief Magistrate under the department of Home and Territories, with the aid of an Advisory Council of twelve members, six nominated, and six elected by the residents, who are the descendants of the Pitcairn Islanders, removed to the island in 1856 from their home, which was becoming too small for them. The Advisory Council had its powers extended by Ordinance 2 of 1925, so that in addition to looking after public roads, reserves, &c., and making by-laws, it can suggest new ordinances or the repeal or amendment of existing ordinances, which are enacted as usual by the Governor-General in Council. The island does not enjoy inclusion in the Commonwealth, or free trade ; its products too would be more valuable to New Zealand, to which it is far nearer (400 miles as opposed to 930), and its population, descendants of British sailors—the mutineers of the *Bounty*—and Tahitian women, have lost energy by prolonged intermarriage. In 1925 a request for a Royal Commission to investigate matters was at first declined, but later conceded, by the Federal Government, which held that it was doing all that was possible for the benefit of the people. They on their part complained of the lack of a trained judicial officer and of poor communications, and urged the need of an improved steamer service to attract tourists, and of some outlet for their young men, who do not even engage in the whaling trade.<sup>2</sup>

### § 10. *The Alteration of the Constitution*

The Constitution of the Commonwealth provides for a great deal of rigidity in fundamentals with much possibility of change in detail. Thus the Parliament may fix electoral divisions for Senate elections in the States, though it has not done so ; may increase or diminish the number of Senators, subject to the rule of equality of original States and a minimum of six members for such States ; may increase or diminish the

<sup>1</sup> *Parl. Pap.*, C. 4193, 8358 ; Order in Council, 18 Oct. 1900.

<sup>2</sup> *Parl. Deb.*, 1925, pp. 1591–8, 2393–8. The Administrator was recalled in 1926, on an unfavourable report by the Commissioner ultimately appointed.

number of members of the Lower House, subject to the rule that it must be as nearly as possible twice as large as the Senate, and that each original State shall have five members ; may regulate the franchise, but not so as to deprive any voter for the Lower House of a State of the right to vote at federal elections ; may prescribe qualifications of members ; decide electoral procedure, and the settlement of disputed elections, which has been done by Act No. 10 of 1907 referring them to the High Court ; may define the privileges of each House and penalize persons acting as members when not duly qualified ; may define the number and remuneration of Ministers, and all matters affecting civil servants ; may freely deal with the finances of the country after ten years from the beginning of the Commonwealth ; may vote itself any salaries it pleases, as it has done without prior consultation of the people, both when the salary was raised to £600 in 1907 and to £1,000 in 1920 ; and may regulate judicial matters on a wide basis, subject to the limitations of the Constitution. But it may not alter its duration of three years, and, most important of all, it may not touch the framework of federation, the distribution of powers and the numerous inhibitions on States and Commonwealth alike. Nor can it by definition increase or vary its authority.

Change in fundamentals, however, can be achieved, contrary to the rule in Canada, and by the vote of the people. Section 128 provides :

The Constitution shall not be altered except in the following manner :

The proposed law for the alteration thereof must be passed by an absolute majority of each House of Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives. But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority, with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-

mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as Parliament prescribes. And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of any State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of a State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law, unless the majority of the electors voting in that State approve the proposed law.

The power of change is doubtless in some degree limited. Thus the purpose of the Act of 1900 was to create an indissoluble Federal Commonwealth under the Crown, and it may certainly be asserted that no constitutional change could eliminate the Crown, nor, as General Smuts has quite properly said, could the Crown through the Governor-General properly assent to a Bill which cut away the foundation of the Constitution. Probably, too, it is the better opinion that the federal character of the Constitution must be preserved, and that the proposal to unify the Commonwealth, creating a number—say thirty—of local government bodies on the model of the South African provinces, on the lines of the tentative Bill brought in in 1910, would require Imperial legislation to ratify it, if it succeeded in obtaining the majorities required, and were allowed to pass as valid by the High Court. Further, the power of alteration does not extend to the Constitution Act, with its provision in s. 5 for the operation of Commonwealth laws, and in s. 8 as to the application of the *Colonial Boundaries Act*, 1895, to the Commonwealth as a unit.

The mode of alteration is simple compared to that laid down in the Constitution of the United States. The rule in the case of deadlocks is specially noteworthy, because it permits of a reference to the people on very slight occasion. The justification for this provision is, of course, the paramountcy of the popular will, which renders it right that immediate reference be

permitted. But the purpose of the Act in allowing the referendum to be brought about by the action of either House has probably been frustrated by the decision of the Governor-General in 1914 that the power to refer must be used strictly according to the wishes of the Ministers, thus depriving the Upper House of the independent position which the Constitution clearly meant to award it, when it is noted that in the ordinary case of deadlocks the power to press for a solution is granted to the Lower House only. Doubtless the effort to provide for the power of the Upper House was due to the impression, early prevalent, that federal government could not be carried on with responsible government, and the impression was so far right that, whenever there has been a conflict between the two, federal government has yielded to ministerial responsibility.

The provision for absolute majorities was due to experience of the difficulty of two-thirds majorities for changes, while the consent of the electors of any State to the alteration of any provision of the Constitution affecting it is an effort to secure that the proviso to the power of change itself shall not be repealed by a referendum, and then the power of change altered without regard to the wishes of the electors. In New South Wales the effort to safeguard changes in the constitution of the two Houses by requiring two-thirds majorities was defeated by the repeal of the clause by simple majorities in 1857, while Queensland adopted the same device in 1871<sup>1</sup> for the Lower and 1908 for the Upper House.<sup>2</sup> The mode of taking referenda is regulated by Acts ;<sup>3</sup> the machinery used is, of course, that of the Federal election officials, but the State is recognized by the right of the Governor to demand a recount and appoint a scrutineer ; the returns may be questioned in the High Court, but no referendum may be vitiated by technical irregularities not affecting the result.

The first referendum was taken in December 1906,<sup>4</sup> contemporaneously with the general election for the House of Representatives. It was desired to alter the date when Senators should enter on office from 1 January to 1 July, because,

<sup>1</sup> *Parl. Deb.*, xi. 165 ff.

<sup>2</sup> *Ibid.*, c. 163 ff.

<sup>3</sup> No. 11 of 1906 ; No. 20 of 1909 ; No. 31 of 1910 ; No. 17 of 1912 ; No. 35 of 1912 ; Nos. 38, 51 of 1915 ; No. 14 of 1919.

<sup>4</sup> *Parl. Pap.*, 1907, No. 7.

whereas the general election for the House of Representatives would, it was expected, normally fall about April, that of Senators would, as matters stood, have to take place about December, and it was clear that Senators who had to face re-election could not attend to the business of the Senate when they had to electioneer on the enormous area of a State. The proposal was carried by a very large majority in all the States, but only 50·17 per cent. of the electors voted. At the general election of 13 April 1910<sup>1</sup> two referenda were submitted. One was simply to allow the Commonwealth to take over the debts of the States as they existed at the time when they were taken over, not, as provided in the Constitution, merely as they were at the time of federation; this was accepted by all the States except New South Wales, which apparently resented any attack on its financial autonomy, and became law by 715,053 to 586,271 votes. But the other proposal, to make perpetual the obligation on the Commonwealth to grant twenty-five shillings a head annually to the States, at the close of the period of ten years during which three-quarters of the net revenue from customs and excise had to be returned to the States, failed of acceptance, through the exertions of the Labour party in New South Wales, Victoria, and South Australia, in the latter case by a very small majority. The total votes were 645,514 for, 670,838 against. Of the voters 62·16 voted, and no less than 82,437 papers were informal, a feature seen also at the referendum of 1906. The objection to the arrangement as to State subsidies was that it would enable the lesser States to block change, if the provision were put in the Constitution. The argument was curious, as the Labour party favoured the proposal, and enacted it as a simple law, while it has often advocated the referendum as democratic.

The decision regarding the reserved powers of the States and the doctrine of immunity of instrumentalities led in 1910 to the passing of two Bills for reference to the people. The first Bill, the Constitution Alteration (Legislative Powers) Bill, was intended to give the Commonwealth power to legislate as to (a) trade and commerce generally, and not merely foreign and inter-State trade; (b) the control and regulation of all corporations (other than State corporations not formed for the purpose of gain), the dissolution of State corporations, and the creation

<sup>1</sup> Ibid., 1910, No. 1; Keith, *Journ. Soc. Comp. Leg.*, xii. 119 f.

and dissolution of Commonwealth corporations ; (c) labour and employment including (i) the conditions of the labour and employment in any trade, calling or industry, and (ii) the prevention and settlement of industrial disputes, including disputes in connexion with employment on State railways ; (d) combinations and monopolies in relation to the production, manufacture, or supply of goods, or the supply of services. A second Bill empowered the Commonwealth to make laws for carrying on an industry or business by or under the control of the Commonwealth, and to acquire for that purpose on just terms any property used in connexion with the industry or business, provided that each House of the Parliament, in the same session, had by resolution declared that the industry or business of producing, manufacturing, or supplying any specified goods, or of supplying any specified services, was the subject of a monopoly.

The laws, duly passed by substantial majorities, were submitted to the electors on 26 April 1911, and were both rejected. Against the first there was a majority of 742,704 to 483,356 ; 52·36 per cent. of the electors voted, and the proposal was accepted only in Western Australia. For the second law the figures were 736,392 against, 488,668 for ; 52·34 per cent. of the electors voted, and again Western Australia alone supported the law. The use to be made of the proposed powers was defined by Mr. Hughes, Acting Premier, in a memorandum of 9 December 1910, in which he insisted that there was no desire to destroy State activities, but merely to supplement them in matters where experience had shown that the Commonwealth was helpless to remedy defects which the States also could not deal with. He anticipated use of the powers to deal with trusts and monopolies where these had evaded the Industries Preservation Act, and to settle disputes which were beyond State power, because any effort at regulation split on the fact that in the neighbouring State conditions were different, a potent source of deep unrest. On the other hand, Mr. Deakin, in a letter of 1 December, deprecated the powers claimed as far too wide and indefinite, and as threatening State authority. He proposed in lieu, as in 1909, to deal with the matter by obtaining authority from the States to allow the Inter-State Commission provided for in the Constitution, though not then set up, to deal with difficulties arising from different conditions affecting labour

in different States. He pointed out that the power to deal with railways meant that the Commonwealth could enforce conditions which were unreasonable, leaving the State to bear the financial responsibility. The Liberal party in all the States threw its weight against the referenda, while the Labour party took the opposite side.

The Labour party, despite the defeat of the referenda, insisted that it was entitled to carry on the government with unimpaired authority, seeing that it had a majority of fourteen in the Senate and thirteen in the House of Representatives. Yet it was the case that the great issue at the general election of 1910 had been whether the Labour scheme of amendment of the constitution or Mr. Deakin's scheme of obtaining power from the States by delegation should be adopted, and the majorities against were crushing, in comparison with the majority in the House election of 672,000 for, 624,000 against Labour candidates. The Government, however, pointed out that the electorate required education in referenda ; that there had been unprecedented unity of the Press in a campaign against the proposals ; and that they would be resubmitted in 1913, when a general election would bring out the voters. Moreover, they decided to accept as valid one of Mr. Deakin's criticisms, that against the grouping of so many subjects in the Legislative Powers referendum, and on 31 May 1913<sup>1</sup> after duly passing the two Houses, there were submitted six referenda, each on a distinct project, namely trade and commerce, with, however, an exception for trade and commerce on State railways ; corporations, but with a saving for State governmental and municipal corporations, whose inclusion in the wide terms of the earlier Bill had been justly censured ; conditions of employment, relations of employers and employees, strikes and lock-outs, the maintenance of industrial peace and the prevention of industrial disputes ; conciliation and arbitration for the prevention and settlement of disputes in relation to employment on State railways ; the control of trusts, combinations and monopolies ; and the nationalization of industries declared to be controlled by monopolies, but with a very important saving for industries conducted by a State or a State corporation. The list shows that an

<sup>1</sup> Keith, *Imperial Unity and the Dominions*, pp. 104-6, 110-12 ; *War Government of the Dominions*, pp. 303 ff.



important concession had been made as regards State railways. The old Bill would have given full power to legislate as to conditions on State railways, the new merely allowed the operation of conciliation and arbitration. Even so, all the referenda were defeated by small majorities ; trade and commerce 958,419 for, 982,615 against ; corporations, 960,711 for, 986,824 against ; industrial matters, 961,601 for, 987,611 against ; railway disputes, 956,358 for, 990,046 against ; trusts, 967,331 for, 975,943 against ; nationalization of monopolies 917,165 for, 941,947 against ; the percentage of electors voting was nearly 74 ; Queensland, South Australia, and Western Australia were in favour, the others against. The voting for the general election returned a bare majority of one for the Liberals, showing that they had profited by the Labour insistence on the referenda. None the less, Mr. Cook in 1914, as has been seen, declined to advise the Governor-General to resubmit the Bills in 1914 at the general election to the referenda, with the result that his party suffered severe defeat, despite its natural appeal as a Government in war time. The new Government felt that it was fully entitled to proceed, despite the war, with the referenda, adding a seventh, to secure coincidence of Senate and House of Representatives elections. Objections were made to any such interruption of the necessary concentration on the work of the war, and ultimately an agreement was patched up, on the understanding that the State Parliaments should be asked to confer on the Commonwealth, for the period of the war and one year longer, the necessary authority demanded by the Commonwealth. In five States, however, the proposal was not homologated by the Parliaments, and Mr. Hughes decided to let the matter stand over, especially as it was becoming clear that the High Court was determined to adapt its jurisprudence to the widest interpretation of the powers given to the Commonwealth under the head of defence. It is interesting to note that the Government offered to mitigate the danger of the referenda conferring too wide power on the Commonwealth, by passing a measure for the initiative and the referendum, so that the people could control the legislators.

At the close of the war the Government, in October 1919,<sup>1</sup> secured the passing of two Bills for referenda. The first com-

<sup>1</sup> Keith, *War Government of the Dominions*, pp. 308 ff.

bined again the substance of the five Bills submitted in 1913, omitting, however, the measure as to conciliation and arbitration in respect of employment on State railways ; the second Bill repeated the proposals as to nationalization of monopolies, but interposed investigation, and a report by a Justice that a monopoly existed before a final decision by Parliament. Concessions of great importance were made, in the fact that the new powers were to endure only for three years, and to lapse if by 31 December 1920 the Government had not summoned a Conference to deal with the recasting of the Constitution. The Government also accepted from the Senate amendments omitting the power to create, regulate, control, and dissolve corporations, since, owing to its brief duration, it was not worth taking this power as to Commonwealth corporations, and it excluded educational corporations created by the States from control, in order to obviate the accusation of invading State rights. In favour of the new powers was adduced the fact that the Court of Conciliation and Arbitration was unable effectively to regulate conditions of industry, that it had not the power to declare a common rule, and had no jurisdiction whatever, unless a dispute extended beyond the limits of a State. It was not desired to supersede, but to harmonize and render effective the State tribunals. Monopolies must be dealt with, and, now the war was over, it was doubtful if the Commonwealth could continue such useful activities as the butter pool or the manufacture of wool in the Commonwealth mills. But the electors on 19 December 1919 rejected the two Bills. The first, for the increase of legislative powers, received only 911,357 votes for, 924,160 against ; the Nationalization Bill had 813,880 for, 859,451 against. The percentages of voters were 64·41 and 58·72, although ballot papers were issued to 71·33 per cent. of the voters. The proposals were accepted by Victoria, Queensland, and Western Australia ; rejected by the others. It is noteworthy that it was found impossible to obtain any substantial number of voters on the referenda on these abstract issues ; the fact compares very curiously with the percentages of 82·75 and 81·34, which were obtained in the votes on the two military service referenda, submitted to the people in 1916 and 1917 on the subject of applying compulsory service for recruiting the oversea forces of the Commonwealth.

The case of the Commonwealth for more extended powers as regards control of monopolies may be supported by such instances as that of the coal combination,<sup>1</sup> the high price exacted for sugar, and so forth, nor is there any doubt that the power to deal with industrial disputes is painfully circumscribed and confused. But to claim the power of dealing with all conditions of Labour and all forms of trade would certainly mean the disappearance of the federal side of the Constitution, and it is not surprising that, despite repeated expressions of intention to convene a convention to discuss the issue of recasting the Constitution nothing was done up to 1927, although the absurd position of the Senate alone would justify serious examination of the issues involved. Further, the States have in two cases at least great reason for feeling disabilities. It has been definitely established that Western Australia is hard hit by federation,<sup>2</sup> while Tasmania has the grievance that the Commonwealth does nothing effective to support her fruit trade, and will not secure her adequate and continuous shipping communications with the mainland ; she lost most seriously during the shipping strike of 1925, though the Commonwealth Government reproached the Labour Government of the State with failing in duty to secure police protection for the steamship which was to be used for relieving the congestion of exports. The Labour solution, as opposed to the creation of new States and the delimitation of functions, is in favour of a unicameral Legislature of 100 members with, say, thirty local councils with no independent powers but entrusted with local authority, but this idea has still much headway to make before it can be said to be likely of acceptance. In the meantime the predominance of Labour in the State Governments and of the Liberal and Country parties in the Commonwealth does not tend to any diminution in State claims, just as formerly, during the period of Labour strength in the Commonwealth, the Liberal Governments tended to stress their authority. The financial dependence of the States on the Commonwealth is a serious difficulty for the States, and the decision in 1920 of the High Court to

<sup>1</sup> For the failure of the common law in the matter of monopolies see Simpson, *L. Q. R.* xli. 393-418. For New South Wales see No. 54 of 1923.

<sup>2</sup> Commonwealth *Parl. Deb.*, 1926, pp. 1361 ff. ; an Act was passed to grant a subsidy.

abolish the doctrine of the reserved powers of the States <sup>1</sup> is a further source of encroachment on their rights.

A curious development of the new Constitution has been the holding of Conferences of Premiers of the States, with or without representatives of the Commonwealth, to discuss business of common interest. This, though at first sight unnecessary, is fully justified, because the Commonwealth has no connexion with the main business of the States, which, therefore, have every reason to seek to co-operate, while in many other fields, especially immigration, co-operation is essential if any results are to be achieved, seeing that land settlement is outside the province of the Commonwealth, while immigration is essentially within her control. Further, the great work of securing the use of the Murray for irrigation has been assisted by co-operation of this kind, though the other problem of the unification of railway gauges in which the Commonwealth has a military interest is still far from settlement, despite its important contribution by using the standard gauge of 4 feet 8½ inches for the transcontinental line from Port Augusta to Kalgoorlie.

A new factor adding urgency to the claim for the revision of the Constitution emerged in 1926, when the High Court on 19 April, in the process of revising the older decisions, declared that, if a Federal award as to workers provided for a longer week than 44 hours, then the Federal award was valid and superseded the State rule.<sup>2</sup> This decision immediately produced a prolonged strife in New South Wales, where, as in Queensland, legislation has pronounced in favour of the 44-hour week, and defiance of the law was proclaimed. Ultimately, however, the workers yielded to the steadfast resistance of the employers, and work was resumed on the terms of the Federal ruling. But not unnaturally the Commonwealth Government decided that there was urgent need for strengthening the Commonwealth Court by its reconstruction to enlarge its personnel and to give it wider authority, on the basis that it ought to have sufficient power to secure settlements of difficulties beyond the capacity of any State to handle, by producing a régime of reasonable uniformity. The case for change put by Mr. Bruce in his August campaign emphasized the fact that Federal jurisdiction

<sup>1</sup> *Engineers' Case* (1920), 28 C. L. R. 129; *Minister for Trading Concerns v. Amalgamated Society of Engineers*, [1923] A. C. 170.      <sup>2</sup> 37 C. L. R. 466.

was impossible until an inter-State dispute had been created, and that, if the Federal Court awarded a wage of 90 shillings for a 48-hour week, and the State 80 shillings for a 44-hour week, men might claim the best of both worlds in the shape of 90 shillings for the 44-hour week with some chance of success. It was essential to secure power under which capable and impartial tribunals could deal with any dispute in Australia, whether confined to one State or extending further afield. The amendments enacted were presented to the electorate in the form of two Bills. The first, dealing with industrial matters, was passed all but unanimously, with the aid of the Labour Opposition, which secured the insertion of powers as to companies. It proposed to amend the Constitution by extending the power of legislation as to conciliation and arbitration for the settlement of industrial disputes to all disputes ; by giving power to establish authorities with such powers as the Parliament confers on them with respect to the regulation and determination of the terms and conditions of industrial employment and of rights and duties of employers and employees with respect to industrial matters and things ; by authorizing the investiture of State authorities with the powers which might be conferred on Commonwealth authorities under the new provisions ; by giving authority to deal with trusts and combinations (whether composed of individuals or corporations or both) in restraint of trade, trade unions and associations of employers and of employees for industrial purposes, including the formation, regulation, control, and dissolution thereof.

Further, the Commonwealth was to receive full power for the creation, regulation, control, and dissolution of corporations ; the regulation, control, and dissolution of corporations formed under the law of a State ; and the regulation and control of foreign corporations ; but not including municipal or governmental corporations, or any corporation formed solely for religious, charitable, scientific, or artistic purposes, or any corporation not formed for the acquisition of gain by the corporation or its members. The other Bill was passed on a party vote, against bitter Labour opposition. It purported to empower the Commonwealth to legislate 'for the protection of the interests of the public in the case of actual or probable interruption of any essential service'. The proposal reflected, of course, the feeling of impotence on the part of the Common-

wealth during the recent strikes in Australia, when by reason of its restricted powers it could do nothing to save the people from grave interference with the command of the necessities of life, and the five Labour Governments in the States sided with the strikers and neglected the obvious duty of securing the interests of the country as opposed to sectional advantage. Labour was divided; the assent of the Federal party was resented in the States, and threats were made of expelling the leader of the Federal Opposition from the Australian Labour party if he did not obey the decision to refuse support to the referenda. The head of the State Labour party in New South Wales attacked the measure regarding industrial matters on the ground that it would enable the Federal Government to create a tribunal with life tenure and representing the views of the employers; the leader of the Opposition in the State objected to it as an encroachment on State authority, and as carrying out a former project of the Labour party, and the Labour Premier of South Australia adopted a similarly hostile view. Tasmania and Western Australia were in no mood to accept any increase of Federal authority, and in Victoria the non-Labour Government disagreed entirely with Mr. Bruce as to the wisdom of his proposals and opposed them vehemently. In the result Victoria, South Australia, Western Australia, and Tasmania rejected both proposals with little hesitation, and only in New South Wales and Queensland was a measure of success achieved for the proposals.<sup>1</sup> Mr. Bruce at once intimated his acquiescence in the result as indicating the voice of the people. He had evidently launched his campaign unwisely, and, as he had predicted a constitutional session to be held in 1927 at Canberra to consider recasting the Constitution, it is not easy to understand how he came to think it wise to submit piecemeal proposals which evidently should have formed part of a wider scheme, if indeed they were worth pressing. Moreover, the rule of compulsory voting enacted in 1924 proved a severe handicap to success. Voters who were confused by the complexity of the issues, and were compelled under pain of fine to vote, may be excused if they thought it best not to support changes which could in no sense be said to be essential, and whose import

<sup>1</sup> Final figures for the first Bill, industry and commerce, for, 1,247,088 against, 1,619,655; for essential services, 1,195,502; against, 1,597,793.

formed the subject of a remarkable divergence of opinion between the Attorneys-General of the Commonwealth and of Victoria.

Some slight palliative for the failure to obtain wider power in industrial matters is accorded in the *Commonwealth Conciliation and Arbitration (Amendment) Act*, 1926, which was necessary to continue the operations of the Court of Conciliation and Arbitration after 30 June 1926; when the President's and Vice-President's tenure of office would end. The new measure confers judicial power<sup>1</sup> on the Court and constitutes it of a Chief Judge and Judges with security of tenure and professional qualifications. The Chief Judge is charged with the duty of endeavouring at all times to reconcile parties to industrial disputes, and to prevent and settle such disputes, whether or not the Court has cognizance of them, if he considers it in the public interest to do so. For this purpose he is given the power, which was formerly non-existent, to summon compulsory conferences of those concerned, a fine of £500 being enacted for failure to obey the summons. Moreover, a Judge may be required to report on any industrial matter or any public matter or in respect of any power of the Commonwealth. Conciliation Commissioners may be appointed, who shall have such of the powers of the Chief Judge as to conciliation under the new Act as may be assigned to them. It was on the basis of this Act that there would probably have been erected the authority to deal with the wider powers as to industrial matters which it was sought to obtain under the referenda.

On the other hand, no constitutional safeguard protects the States from risk of grave financial pressure by the action of the Commonwealth as embodied in the revision of grants to the States. The measure introduced in June 1926 proposed to withdraw all capitation grants, relieving the States, however, by vacating the sphere of land tax, estate duties, and entertainment tax, and lowering income tax to individuals and companies. The policy was justified on the score of a complete change in circumstances since federation, the Commonwealth having an enormous burden of war debt, involving a payment of

<sup>1</sup> In *Alexander's Case*, 25 C. L. R. 434, it was ruled that the limited tenure of the President and the Deputies deprived the Court of its judicial functions and rendered it unable to enforce its orders. The salaries now given are £3,000 and £2,500, life tenure, but pensions after fifteen years; *Debates*, pp. 2234 ff.

£20,000,000 for some fifty years, and being faced with £9,000,000 for old age pensions, £700,000 for maternity allowances, and the necessity of large railway expenditure for unification of gauge and strategic and developmental railways. The States, however, would receive certain grants, in all £600,000 in the first year of the new scheme, with £450,000 and £378,000 a year for Western Australia and Tasmania, in view of their unfortunate position under federation. The proposals were wholly unacceptable to the States when discussed in conference, it being asserted that they had a definite right to share in the proceeds of customs and excise, and that federation would never have been agreed to if the States had been left to depend on land and income tax as against indirect taxation.<sup>1</sup>

Co-operation between Commonwealth and States is difficult in other spheres also. The arrangement under which since 1920 the Commonwealth has undertaken the responsibility for recruiting immigrants and transporting them to Australia, while actual settlement rests with the States, has not resulted in effective immigration, nor avoided bitter complaints as in Victoria of the criminal tendencies of an undue number of the immigrants. The immigration agreement of 8 April 1925 between the Imperial and the Commonwealth Governments rests on the provision of £34,000,000, to be lent in ten years to the States at a low rate of interest for developmental work, on condition that for each £75 advanced one immigrant shall be effectively settled. The Commonwealth has supplemented this by the *Development and Migration Act*, 1926, which sets up a Board of four members charged with the duty of reporting on matters concerning the development of the Commonwealth, whether by agreement with the States or otherwise, including the establishment of new industries, and on all proposed settlement schemes suggested by the States ; no such scheme will be approved unless recommended by the Commission. The States, however, though nominally accepting the scheme, with the exception of New South Wales, have shown clearly that their one concern is the securing of cheap money for development, and that immigration is a very secondary consideration, while the Commonwealth Labour party was frankly hostile to the whole scheme, though professing lip service to the need for a larger population to hold Australia.

<sup>1</sup> See resolutions of Victorian Council and Assembly of 7 and 21 July 1926.



### III

## THE UNION OF SOUTH AFRICA

### § 1. *The Formation of the Union*

BRITISH policy, in its desire to check the tendency to expansion to the north with its uncertain burdens, accepted the unfortunate course of allowing the establishment in the north of independent States established by those British subjects whom British policy in regard to natives induced to abandon their connexion with the British Crown. The wisdom of seeking to avoid this outcome, and to continue the connexion of the emigrants with the Crown, while giving them local autonomy, was unquestionably grasped by Sir G. Grey in his proposals for the creation of a federation to include with its consent the Orange Free State and the Boers of the Transvaal area, but it is clear that the idea was premature, and it is difficult to censure severely the failure to follow up the suggestion, which was not commended by Sir G. Grey's <sup>1</sup> disregard of Imperial instructions involving his intended recall. Though this was not carried out, through the Queen's intervention on a change of Government, he was not permitted further to develop his theory. On the other hand, Sir H. Barkly in 1871 found Lord Kimberley sympathetic, and on opening the Cape Legislature in 1872 he insisted on the benefits which might accrue from federation, in the shape of uniform legislation, better postal and railway facilities, and a more effective native policy. But the matter was overshadowed by the discovery of diamonds, and the Imperial decision to annex Griqualand West, which embroiled it with the Orange Free State and put confederation out of the question. Lord Kimberley saw that, until this matter was arranged, it was idle to proceed, but Lord Carnarvon in the Conservative Government conceived the idea of forcing confederation on the territories, inspired by admiration for the federation of Canada, but forgetting that it had been a spontaneous movement in its initiation, and that the

<sup>1</sup> *Parl. Pap.*, H. C. 216, 1860; *Cana, South Africa*, pp. 36 ff.; Henderson and Collier's *Lives*.

part played by the Imperial Government had, put at the highest, been no more than inducing Nova Scotia and New Brunswick to enter federation, whereas the essence of the federation was the determination of the statesmen of the United Province of Canada to secure the separation of the two uncomfortable yokefellows. Sir Bartle Frere was thus commissioned to proceed to the Cape as Governor to carry out Lord Carnarvon's policy of federation, while Mr. Froude was sent to pave the way by sounding those concerned. The dispatch of 4 May 1875<sup>1</sup> based on these investigations was a hopeless document; it insisted on the necessity of free action by all parties, but it made definite suggestions which were needlessly impracticable. The Cape, it was suggested, should be represented at the Conference by Mr. Molteno for the western province, Mr. Paterson for the eastern, a view which at once reopened a controversy which had seemed to be disposed of in 1872, when the Imperial Government, on the grant of responsible government to the Cape, declined to intervene in any way to secure a separate status for the east of the Colony. The Cape Parliament hotly repudiated the idea that there should be representation in the manner suggested, and, despite Lord Carnarvon's efforts on 15 July<sup>2</sup> to smooth away the opposition, the Cape declined to take any steps to discuss federation, Mr. Froude, sent to represent the Imperial Government, finding Mr. Molteno adamant. President Brand<sup>3</sup> of the Free State was expressly forbidden by his Legislature to discuss federation, though he took up other matters with the Imperial Government on a visit to London in 1876, and an effort to melt Mr. Molteno's heart and induce him at least to consult<sup>4</sup> with Natal delegates failed of fruition, that Premier having become a rabid opponent of federation. The annexation of the Transvaal in 1877 proved very far from helping on the cause, though Mr. Froude anticipated Lord Selborne<sup>5</sup> in pointing out to the Free State and the Transvaal that federation would enable the South African Colonies to escape the weight of Imperial intervention,

<sup>1</sup> *Parl. Pap.*, C. 1244 (1875); C. 1399 (1876); H. L. 40; C. 1632 (1877); C. 1980 (1878); Molteno, *Sir John Molteno*, i. 329 ff.; ii. 1; Walker, *Lord de Villiers*, pp. 130 ff.

<sup>2</sup> *Parl. Pap.*, C. 1399, pp. 5 ff.

<sup>3</sup> *Ibid.*, C. 1631, p. 47; C. 1980, pp. 17 ff.

<sup>4</sup> *Ibid.*, C. 1631, pp. 61-79.

<sup>5</sup> *Ibid.*, Cd. 3564, p. 18.

and that their native policy in special would thus be relieved from British supervision—a rather characteristically immoral suggestion, which did not deceive the more wily Boers to whom it was addressed. At any rate, when in 1880 there was at last a Cape Ministry in office willing to consider federation and on good terms with Sir Bartle Frere, the Transvaal would have nothing to do with it, and the revolt and retrocession of 1881 marked the end of the possibility of federation for the time being.

The most substantial outcome of the effort was the passing through Parliament in 1877<sup>1</sup> of an Act as a sort of hint of what a federal constitution would be, but the measure was of course purely facultative, and was allowed to expire in 1882 without renewal given in this form. The Act was based almost slavishly on the model of the *British North America Act*, but it left much vague, such as the constitution of the Legislative Council and the governments of the provinces. The powers which were to be divided between them and the central Government were enumerated in ss. 33 and 34 on the model of ss. 91 and 92 of the *British North America Act*, but by s. 37 power to vary was given to the Crown. The power to disallow provincial Acts was to be given to the Governor-General, and a section (11) provided very unusually that the term was to mean the Governor-General acting without his Privy Council,<sup>2</sup> a definition intended to meet the difficulty which had arisen in the case of the Dominion regarding the disallowance of provincial Acts. As it was, however, expressed generally, it had a bizarre effect when applied in other sections. Laws affecting natives, or native affairs, or immigration, and provincial laws regarding tenure of land were to be reserved, unless assent was deemed urgent, in which case they were forthwith to be transmitted to the Imperial Government. Full power to carry out treaty obligations was given by s. 54, as in Canada by s. 132 of the *British North America Act*. Section 19 provided in principle for the due representation of natives in the Parliament and in the provincial Councils in such manner as would not endanger the stability of the Government. All that remained from the passing away of the Act was s. 58;

<sup>1</sup> 40 & 41 Vict. c. 47.

<sup>2</sup> Contrast the Tasmanian definition, *Interpretation Act*, 1906, s. 12; *South Africa Interpretation Act*, 1910.

authorizing the Crown to annex territories to the Cape of Good Hope.

The disunion of South Africa, which might have lasted much longer, became less tolerable when first the discovery of diamonds opened up a revolutionary era in railway construction, and then the gold rush to the Rand brought about the industrial development of the Transvaal, which by 1892 was in direct railway communication with Capetown, Port Elizabeth, and East London, and shortly after with Durban, and, most important of all, Delagoa Bay, awarded in 1875 by Marshal Macmahon's arbitration to Portugal. The obvious unfairness of the Cape and Natal retaining all the receipts on customs for imports was admitted in theory in 1882; but the first effective remedy arose in the agreement of 1889 for a Customs Union between the Cape and the Orange Free State, joined in 1891 by Basutoland, and in 1893 by Bechuanaland. Natal at last agreed to come in in 1898,<sup>1</sup> when the amount to be retained by the coast colonies was reduced to 15 per cent. The railway question had been settled by a compromise in 1895, after the dispute between the Cape and the South African Republics, over the question of the Cape share in the trade going to the Republic, had been settled only by the weight of Imperial intervention in support of the Cape, after the Boer Government had closed the drifts and Mr. Rhodes, with the assent of his Dutch Ministers and of Mr. Schreiner, had offered to pay half the cost of a war to force the Republic to open them.<sup>2</sup> The war fortunately in the long run did nothing to hinder union. It resulted in the removal of the preliminary difficulty of the independence of the two Republics which had all along been unwilling to consider any acceptance of allegiance to the Crown. Then it resulted, in the case of the two Colonies annexed, in the placing of their railways and police under the administrative superiority of the Intercolonial Council constituted under various Orders in Council of 1902-5,<sup>3</sup> while in 1903 a Customs Union of the four Colonies,<sup>4</sup> Southern Rhodesia, and the territories

<sup>1</sup> On the defeat of Rhodes' and Milner's federal aspirations then, see Walker, *Lord de Villiers*, pp. 321 ff. Southern Rhodesia's customs were dealt with in the new Order in Council of 1898, which prevented their increase beyond the existing Cape tariff for British imports.

<sup>2</sup> B. Williams, *Cecil Rhodes*, pp. 258 ff.

<sup>3</sup> 15 Sept. 1902; 20 May 1903; 21 Apr. 1904; 12 Jan. 1905; 10 May 1905.

<sup>4</sup> Walker, *Lord de Villiers*, pp. 410 ff.

under the High Commissioner, was achieved and renewed with variants in 1906. But in 1901 the railway situation was made more complex by the definite conclusion of a *modus vivendi*<sup>1</sup> between the Transvaal and Mozambique, under which, in exchange for arrangements regarding the engagement of natives from Portuguese territory for the mines, then desperately in need of labour, the Transvaal undertook obligations to secure to the port of Delagoa Bay her former share of the railway traffic to the Transvaal, as compared with the traffic of the British colonies to the South. This arrangement naturally proved a bone of contention as time went on, especially as financial depression set in in the Cape, rendering severe economies essential, and contrasting painfully with the wealth of the Transvaal with its reviving industry and plentiful supply of labour, secured, as was felt in the south, at the sacrifice of the coastal colonies. The Transvaal again felt that it was unduly burdened by the high duties levied under the Customs Union, in order to meet the view of the coastal colonies, whereas it desired the cheapest possible imports in order to cut down its working expenses. The grant of responsible government to the conquered colonies made them free to mould their own destinies; the Intercolonial Council disappeared, and the South African Constabulary gave way to local police forces, but the combined management of railways was saved, a body with three representatives of the Transvaal and two of the Orange River Colony being set up to deal with them: The issue of native affairs also drew attention to the utter confusion of the control of these matters in South Africa; the Native Affairs Commission 1903-5<sup>2</sup> produced a very sensible report—most of which naturally was never acted on—in which constant reference was made to the muddle caused by differing policies in different parts of South Africa, and still more pointedly the investigation carried on in Natal into the causes of the rebellion of 1906-7 revealed the monumental incapacity of the Government of Natal to deal, with even moderate intelligence, with native problems.<sup>3</sup> The necessity of being prepared to meet a possible wider native rising had led to proposals<sup>4</sup> for better co-ordination of defence

<sup>1</sup> Walker, op. cit., pp. 370 ff.

<sup>2</sup> *Parl. Pap.*, Cd. 2399.

<sup>3</sup> *Ibid.*, Cd. 3889.

<sup>4</sup> *The Government of South Africa*, i. 101; ii. 148.

forces in 1907, and common interests in matters of agriculture and pastoral care—destruction of locusts, control of East African fever and scab—emphasized the artificial character of South African boundaries. The position was comprehensively summarized by Lord Selborne at the close of 1906, in a rather commonplace memorandum<sup>1</sup> decorated by some cheap rhetoric, and with an artificial emphasis on the benefits of Union in eliminating British control from South Africa, and on the benefits of securing for South Africa control—which was never to be realized—over the development of Rhodesia. More practically, the matter was taken up from one aspect at the Colonial Conference of 1907<sup>2</sup> in London, when the advantages of having a single Court of Appeal from all the South African Colonies were conceded. Moreover, the weakness of the South African representatives with their small areas behind them was somewhat keenly felt in comparison with the impressive representation of Canada by Sir W. Laurier and Australia by Mr. Deakin.

The actual cause of the advent of union was, as might be expected, the pressure of financial considerations in the wide sense of that term, accentuated by native rebellion in Natal, due to serious misrule. When the question of customs revision came up at the conference of May 1908, together with the problem of railway rates, there seemed to be no way out, on the basis of the existing constitutional relationships. The delegates, therefore, agreed to recommend their Legislatures to send delegates to a National Convention to draft a constitution. As a result, there met on 12 October 1908 at Durban a Convention of 33 representatives, 12 from the Cape, 8 from the Transvaal, 5 each from Natal and the Orange River Colony, and 3, with a watching brief only, from Southern Rhodesia. The Convention<sup>3</sup> changed its place of sitting to Capetown and in February completed its draft constitution. The draft, most unexpectedly from the popular point of view, turned out not to be one of federation at all. This had been the natural expectation of South Africa, where differences between the provinces seemed real enough to

<sup>1</sup> *Parl. Pap.*, Cd. 3564. 'One-sided,' Smuts, in Walker, *Lord de Villiers*, p. 422.

<sup>2</sup> *Parl. Pap.*, Cd. 3523, pp. 207 ff.

<sup>3</sup> In addition to the official record see Brand, *Union of South Africa* (1909); Walton, *Inner History of the National Convention* (1912); Walker, *Lord de Villiers* (1925); Colvin, *Jameson* (1922).

justify federation, and all advocates of closer union, from Saul Solomon in 1853 to Messrs. Rhodes, Brand, and Hofmeyr in the pre-war period had spoken in favour of it. The High Commissioner had assumed that it would be the form adopted, while Generals Botha and Smuts, though preferring unity, thought federation all that could be achieved; Natal notoriously disliked any closer relationship. But, while in the Cape Messrs. Hofmeyr and Schreiner championed the old ideal, Mr. Merriman was set on unity, reviving the Cape ideal of the gradual acquisition by her of the rest of South Africa, which once had seemed possible by a long series of annexations. He found unexpected support in ex-President Steyn, of the Orange Free State, who held that matters in Europe were so menacing that a loose federation was wholly unwise, and Sir J. H. de Villiers, Chief Justice of the Cape, who had visited Canada in 1908 to inspect the working of federal institutions, and who had been made Chairman of the Convention, showed himself absolutely converted to the ideal of union. The result was that, when on the opening of the Convention the ideal of federation was supported by Mr. Morcom for Natal, it was set up against the ideal of union supported by Mr. Merriman, and the weight of the Convention was at once shown to incline to union. The constitution, therefore, emerged from the Convention as one of union, with provinces maintained in existence, but subordinated to the Union Parliament. To gratify Dutch feeling, Dutch was given equal place with English, while, on the other hand, British demands were met in agreement upon the principle of roughly equal electoral districts—with a fifteen per cent. margin—and proportional representation.

The reception of the draft was most cordial in the Transvaal, where Parliament accepted it without alteration; in the other three colonies changes were desired, especially by Natal, which regretted the non-federal character of the result, but also in the Cape<sup>1</sup> and the Orange River Colony, where dislike was felt for the attempt to assign equal value to votes and for the demand for proportional representation. The Convention, therefore, resumed its deliberations in May at Bloemfontein, when the Transvaal remained firm in demanding the acceptance of equal

<sup>1</sup> Hofmeyr, Schreiner, and Sprigg honourably regretted the sacrifice of native interests; Walker, pp. 469 ff.

electoral districts, but proportional representation was sacrificed, being retained only for the election of Senators and members of the provincial committees. The final draft of 11 May 1909 was duly submitted to the Parliaments, and accepted by the Cape, Transvaal, and Orange River Colony ; in Natal, the taking of a referendum had from the first been asserted to be necessary by the Natal Government, and it was duly held ; the voting of 11,121 to 3,701<sup>1</sup> was unexpectedly decisive, and it was, therefore, easy for the Bill to be definitely accepted. Delegates accordingly proceeded to England to secure the passing of the draft as an Imperial Act, it was debated in the Lords on 27 July and 3 August, in the Commons on 16 and 19 August, but no changes were insisted upon, though the enactment of a colour bar for membership of the Parliament was felt to be a retrograde step, and the Government gave a formal promise, which was duly honoured, that the Governor-General would be given formal instructions that, in addition to the safeguard for the native franchise in the Cape preserved in the Act, the position was to be strengthened by his reserving any Bill which might be passed to withdraw the franchise. It was added that Imperial assent to such a measure would certainly not be a matter of course. This was done as a measure of reassurance to the coloured voters, whose petition had been duly brought before the notice of the Imperial Parliament by Mr. Schreiner and had elicited some degree of sympathy. There were, however, insuperable reasons against interfering with the Bill ; the permission given to the Transvaal and the Orange Free State, as part of the terms of surrender of the burghers in the field on 31 May 1902, that the natives would not be accorded the franchise by any Crown Colony Government, had surrendered the position of interference in the will of the colonists, and it was pointed out that the right of non-Europeans to be elected to the Cape Parliament had remained only a possibility, while, even as matters stood, a person of colour could be elected to the Cape Provincial Council. The theoretical objection that the union had been brought about, save in Natal, by Parliaments which had never consulted the electors on the issue was unanswerable, but it could be pointed out that the same thing had happened in the case of Canada and Nova Scotia, and the approval of the

<sup>1</sup> *Parl. Pap.*, Cd. 5099.



people of the colonies was held, justly, to be adequately established by the absence of any protests of any sort.

The Act by s. 4 authorized the King, by proclamation within a year after the assent of 20 September 1909 to the Act, to declare that the four colonies should be united in a Legislative Union under the name of South Africa, the colonies becoming original provinces with their existing boundaries, and the Orange River Colony reassuming its title of Orange Free State. The King was then to appoint a Governor-General, and a day to be fixed for the coming into being of the Union. This was made 31 May 1910, the anniversary of the peace of Vereeniging, and Lord Gladstone was duly named as first Governor-General. He chose as his Prime Minister General Botha, who decided on the formation of a party Ministry; thus disappointing the hopes of those who had thought that, as the Convention had been essentially non-party, the first Government of the Union might have been national in character, an ideal too elevated for the narrow partisanship of South Africa. The choice of nominated Senators was also made on party lines by the Government, and that of the elective Senators on a similar basis by the two Houses of each Parliament sitting together and voting on the proportional system.

As in the case of the Commonwealth, but with better reason, the *Colonial Boundaries Act*, 1895, was made expressly applicable to the Union only.

## § 2. *The Executive Government of the Union*

The *South Africa Act* is largely influenced by the Commonwealth Constitution, as well as the *British North America Act*, but from both it differs by the express assertion that, while the executive government is vested in the King, it may be exercised by the King in person or by a Governor-General as his representative. It is curious, however, that the Executive Council is provided for merely as advisory to the Governor-General, so that the effect of the innovation seems rather dubious. In the other Dominions the Crown, if present in them, would clearly not be able to administer in person. As in the case of the Commonwealth, the Governor-General is authorized to exercise such powers and functions of the King as His Majesty

may be pleased to assign to him. On the strength of this provision the usual letters patent were issued to create the office and to assign to the Governor-General the prerogative of pardon. Section 11 of the Act expressly allows the appointment of deputies during temporary absence<sup>1</sup>—presumably from the Union—but without impairing the authority of the Governor-General, which contradicts the restriction of his authority to the area of the Union in s. 9. Section 11 contemplates the appointment of an officer to administer in lieu of the Governor-General from time to time, and the letters patent accordingly gave the administration to the Chief Justice. It was at one time proposed to forbid the administrator to draw any other pay from Union funds when so acting, but this was dropped; as the Act stands, £10,000 is payable annually to the Crown for the salary of the Governor-General, which amount may not be diminished during his tenure of office. Arrangements for division of salary, if the Governor-General goes on leave, thus may be settled privately.

Generally speaking, the Constitution transfers to the Governor-General, or the Governor-General in Council as the case may be, the powers, authorities, and functions vested at Union in the Governors or Governors in Council in the Colonies. There is one exception; by s. 147 the control and administration of native affairs and of matters specially or differentially affecting Asiatics throughout the Union shall vest in the Governor-General in Council, who shall likewise exercise all special powers in regard to native administration, hitherto vested in the Governors of the Colonies or exercised by them as Supreme Chiefs, and shall control all native reserves, which, if hitherto inalienable save under an Act of the Colonial Parliament, shall be inalienable save under an Act of the Union. This clause negatives the rule under the Natal Constitution of 1893 by which the Governor, in regard to the natives, was left in theory with a duty to act, if he thought fit, against ministerial advice, while a similar position was still more in theory allotted to the Governors of the Transvaal<sup>2</sup> and the Orange River Colony.<sup>3</sup> Section 13 makes it needlessly

<sup>1</sup> Clause v of the letters patent of 1909 allows the Governor-General to continue to administer despite temporary absence to neighbouring territory; clause vi allows him a temporary absence from the seat of Government as well as from the Union.

<sup>2</sup> Letters patent, 6 Dec. 1906, s. 51.

<sup>3</sup> Letters patent, 5 June 1907, s. 53.

clear that the Governor-General in Council denotes that official acting with the advice of his Council, while the *Interpretation Act*, 1910, hastened to define Governor-General as Governor-General in Council.<sup>1</sup> There is, of course, no real importance in these definitions, which merely emphasize the regular rule of action by advice of Ministers, without negating the right to refuse advice and dismiss Ministers if emergency demands, while the power to appoint Ministers remains unfettered. Following the Commonwealth model, ten—now eleven—Ministers shall be Executive Councillors, but the number of that body is not limited, though on the same model its connexion with Parliament is ensured by the provision that a Minister must obtain a seat within three months of appointment, if not in Parliament.

The control of the land and naval forces within the Union is vested by s. 17 in the King or in the Governor-General as his representative. This clause is peculiar, for in the Commonwealth the power is vested, in respect of the local forces, in the Governor-General, and has no application to Imperial forces. In Canada the command in chief of naval and military forces of and in Canada is vested in the Crown, and the style of commander-in-chief was granted to the Governor-General only by letters patent of 1903. A similar title is borne by Colonial Governors; as a rule it does not extend to the naval forces of the Imperial Government, and is purely honorific; <sup>2</sup> but, strictly speaking, it would apparently apply even to His Majesty's ships of war in Union waters.

### § 3. *The Parliament of South Africa*

In the composition of the Parliament, despite the fact of union, the provincial element was allowed to have weight. Thus the Senate was composed for the major part—32 out of 40 members—of persons elected in joint session by the Colonial

<sup>1</sup> So Commonwealth *Interpretation Act*, 1901. When personal action is needed, specific derogation is made as in Tasmania, Act No. 10 of 1908, s. 2, as to indeterminate sentences, as opposed to the *Interpretation Act*, 1906. Cf. Barton, *Melbourne Federal Debates*, pp. 2253 ff.; *A.-G. v. Goldsbrough* (1889), 15 V. L. R. 638, 647.

<sup>2</sup> For an inconvenient case of personal responsibility, see a New South Wales case of 1869; Clark, *Austr. Const. Law*, pp. 266 ff.

Parliaments before their expiry, while casual vacancies were to be filled for the first ten years by the Provincial Councils under proportional representation. At the close of the ten years the Senate was reconstituted by election by the Provincial Council sitting with the members of the Parliament for the province, thus constituting definitely a provincial body. Similarly, in fixing the number of members of the House of Assembly, the rather remarkable step was taken of according to the two small provinces a minimum membership irrespective of their claims on the score of population. The provisions for revision of numbers in accordance with the quinquennial census up to a maximum of 150 members are further illustrations of respect for the provincial divisions.

The other feature of special interest is the acceptance of the provincial franchises as the means of deciding the vote. This was rendered inevitable by the fact that the Cape would not surrender its native franchise nor the other provinces accept it, and so the matter was left to the existing practice. This was done, though not for racial purposes, in Canada during its early years, and then from 1898 until 1917. The native franchise in the Cape was safeguarded by the requirement that it could be altered only by a Bill passed in joint session of the two Houses by a two-thirds majority of the total numbers of the two Houses. The Bloemfontein Convention agreed to reservation of such Bills, but, in view of doubt as to the legal position, special steps were taken to insert the requirement of reservation in the royal instructions. The uneasiness felt at the time as to the possibility of the growth of the design of destroying the vote was shown to be justified in 1925, when General Hertzog, taking up a suggestion of the Native Affairs Commission of 1903-5, pressed for the desertion of the native franchise, offering instead to the natives in all four provinces the privilege of voting for two (in Natal one) special European representatives. Definite plans for this end for enactment in 1927 were tabled in 1926.<sup>1</sup> As already mentioned, the exclusion of non-Europeans from membership of Parliament was expressly enacted, though if it were inserted under the fear lest, under

<sup>1</sup> The coloured people of the northern provinces are likewise conceded one European elected by themselves. De Villiers was far too sanguine of the safety of the vote; cf. Walker, pp. 446 ff.

proportional representation, the purity of the House of Assembly might be sullied by the presence of a person of colour, that vision should have disappeared, as Mr. Lyttelton suggested, with the abandonment of proportional representation. The same decisive view of the native as an inferior being is seen in the rule that only European male adults are reckoned in calculating claims for representation. Again, the choice of four of the eight nominee Senators is to be dictated by reason of their thorough acquaintance, by reason of official experience or otherwise, with the reasonable wants and wishes of the coloured population of the Union. The selection under this clause has been on the whole fairly satisfactory,<sup>1</sup> though at the outset the sudden decision to appoint an ex-Premier of Natal, who had failed to secure election to the Lower House, to the office of Senator on this score caused some criticism, having regard to the distinguished muddling of native policy by the Natal Government.

The vexed question of the capital, which Lord Selborne oracularly asserted to admit of easy solution when South Africa was viewed as a whole, was in fact, as any reasonable person might have expected, solved, not on any principle, but as the result of much intrigue and compromise<sup>2</sup> in the sense that Pretoria became the administrative capital, Capetown the place of meeting of the Parliament, and Bloemfontein the normal seat of the Appellate Division of the Supreme Court, a distribution at once inconvenient and illogical.<sup>3</sup> Precedent, however, can be cited for such confusions in the case of the decision in Australia to create at Canberra a quite needless capital despite the existence of Sydney and Melbourne.

#### § 4. *The Government of the Provinces*

While, save for the anti-native provisions, there is nothing of special interest in the constitution of the Union Executive or Legislature, the case is other with the provinces, which represent that very rare thing, an effort to create something really new

<sup>1</sup> It is clear, however, that General Hertzog holds that the nominee Senators should be changed by each Ministry; see p. 500.

<sup>2</sup> Natal was consoled by an agreement with the Cape and the Transvaal on railway matters; Walker, *Lord de Villiers*, pp. 466 ff.

<sup>3</sup> De Villiers endeavoured to evade actual sitting there; Walker, pp. 494 ff.

in the shape of colonial institutions. The provinces, as we have seen, represent a compromise between the federal and union ideas. Natal fought to save whatever she could of federal principles, while the other delegations were anxious to infuse into the constitution, as far as possible, a really unitary aspect. Therefore it was decided that the provinces were not to be allowed to set up as minor Parliaments, while on the other hand they were not to be degraded to the level of large local government areas.

At the head of each provincial administration is placed an Administrator, whose appointment is based on the Canadian model. Thus he is selected by the Governor-General in Council, receives a salary marking his office as of high importance, and is not to be removed for five years, save for cause assigned to be communicated to both Houses within a week. But otherwise the position is inferior by far to that of a Lieutenant-Governor. In lieu of an Executive Council the Administrator is associated with an Executive Committee numbering four, elected after each general election on the system of proportional representation with the single transferable vote, by the members of the Provincial Council. They receive a salary fixed by the Council and hold office until the selection of their successors, and are, of course, eligible for re-election. They need not be members of the Council; if not, they may sit and speak, like the Administrator, but are like him not able to vote. Any casual vacancy is filled by the Council, if in session; if not, until it meets by the Committee, and, if at any time the number of Committee members falls below the quorum, then the Administrator must summon a meeting of the Council to fill the vacancies. Pending such election the Administrator acts alone. The Administrator, who counts as one of the Committee, has beside his ordinary vote a casting vote in case of equality of votes, and the Committee may make rules for the conduct of business, subject to the approval of the Governor-General in Council. The sphere of the Committee's authority is defined by the transfer to it of all the powers of the Governor or Governor in Council or any minister of a colony in respect to matters upon which the Provincial Council is empowered to make ordinances. In all matters not reserved to or delegated to the Council by the Act, the Administrator shall act on behalf

of the Governor-General in Council when required to do so, and in such matters he may act without reference to the other members of the Committee. The Committee may, subject to any Acts of Parliament regulating the appointment and tenure of officers, appoint additional officers for provincial affairs, to supplement those transferred under the Act to the provinces, and provide for their organization and discipline.

The Councils were not to be political, but they were to be elected in the Parliamentary divisions and by the same electors and on the same franchise as the members of the House of Assembly, save as regards the Orange Free State and Natal, to which there were assigned twenty-five members each, in lieu of seventeen for the Assembly, with the result that special divisions had to be delimited by the same Commission which originally fixed the Assembly divisions. The Administrator may summon and prorogue the Council, but there must be one session every year, so that there shall never be more than twelve months between the close of one session and the opening of another. The Council elects its own chairman and fixes its own rules of procedure, subject to disallowance by the Governor-General in Council. The salaries are fixed by the same authority and the members enjoy freedom of speech. The duration of the Council is three years, and it is not subject to dissolution by the Administrator.

The legislative authority ascribed to the provinces was laid down as follows, in the *South Africa Act*, 1909: (1) direct taxation in the province in order to raise revenue for provincial purposes; (2) borrowing of money on the sole credit of the province, with the approval of the Governor-General and subject to regulations made by Parliament; (3) education other than higher education; (4) agriculture to the extent and subject to conditions defined by Parliament; (5) the establishment, maintenance, and management of hospitals and charitable institutions; (6) municipal institutions, divisional councils, and other local institutions of a similar nature; (7) local works and undertakings within the province, other than railways and harbours and such works as extend beyond the borders of the province, and subject to the power of Parliament to declare any work a national work and to provide for its construction by arrangement with the Provincial Council or otherwise;

(8) roads, outspans, ponts, and bridges, other than bridges connecting two provinces; (9) markets and pounds; (10) fish and game preservation; (11) the imposition of punishment by fine, penalty, or imprisonment, for enforcing any law or any ordinance of the province made in relation to any matter coming within any of the classes of subjects enumerated; (12) generally all matters which, in the opinion of the Governor-General in Council, are of a merely local or private nature in the province; (13) all other subjects in respect of which Parliament shall by any law delegate the power of making ordinances to the Provincial Council.<sup>1</sup> Moreover, a Provincial Council is empowered by s. 87 to recommend to the Parliament the passing of any Act on a subject on which the Council is not empowered to make ordinances, and provision is made by s. 88 for the use of the Provincial Council to take evidence for or against any private Bill which must be promoted in the Parliament, and the Parliament may dispense with taking evidence otherwise. The Bills passed by the Councils must be presented for assent to the Governor-General in Council, who must either assent, decline to assent, or reserve within a month of presentation; on reservation assent must be given, if at all, within a year from presentation. The Administrator has no veto and no vote in the Council.

The supremacy of Parliament is undoubted, and the ordinances of the Councils, despite the assent of the Governor-General in Council, are valid only in so far as they do not run counter to any Act. Thus the Parliament may at any time, without exceeding its legal or constitutional power, override any provincial ordinance, and in point of fact the Transvaal Gold Profits Tax was thus disposed of by the Union, by Act No. 5 of 1921. But naturally the Union power could not be used in

<sup>1</sup> It has been decided (*R. v. Adam*, [1914] C. P. D. 802; *R. v. Maroon*, [1914] E. D. L. 483) that if power is given to raise revenue from any source and to legislate by issue of licences, the power extends not merely to regulate and manage revenue but to regulate the trade. A province may give a municipality any powers natural to such a body though not possessed by the province (*Williams v. Johannesburg Municipality*, [1915] T. P. D. 362; *Middelburg Municipality v. Gertzen*, [1914] A. D. 544) but not powers of its own not appropriate to a municipality (*Maserowitz v. Johannesburg Town Council*, [1914] W. L. D. 139. See *Groenewoud v. Innesdale Municipality*, [1915] T. P. D. 413; *Head & Co. v. Johannesburg Municipality*, [1914] T. P. D. 521).



local matters without destroying the provinces,<sup>1</sup> and against this public feeling has been strong, so that the tendency of the legislation of Parliament has been to strengthen the provinces in dealing with all really local matters, while preventing their intervention in national issues. Moreover, the power of the provinces to deal differentially with natives has been denied by the Courts, that being a power clearly reserved to the Union as a whole.

After elaborate investigation the *Financial Relations Act*, No. 10 of 1913, added considerably to the powers of the Councils. If the matter is included in the heads given in Schedule II the Governor-General in Council may, with the concurrence of the Executive Committee, determine whether the additional matter shall be so entrusted, while on any other matter an Act of Parliament is necessary for transfer.<sup>2</sup> When any point is allotted, the Provincial Council may make ordinances in respect of the transferred matter. The issues concerned include the destruction of noxious weeds and vermin; the registration and control of dogs outside municipal areas; the experimental cultivation of sugar, tea, and vines, save as these matters concern the administration of the laws relative to diseases of plants; the making of grants to agricultural and kindred societies not being registered under any law; the administration of libraries, museums, art galleries, herbaria and botanic gardens, excepting the governmental libraries at Capetown and Pretoria; the control of places reserved out of Crown lands by the Union Government as public resorts or as of historical or scientific interest; the administration of cemeteries and casual wards; the distribution of poor relief; the regulation of the opening and closing of shops, and regulation of hours of shop assistants; the administration of the *Labour Colonies Act*, 1909, of the Cape; the establishment and administration of townships; the licensing and control of vehicles and of other means of conveyance using roads under provincial control; the regulation of horse-racing and betting and of totalizators.

<sup>1</sup> The provinces cannot affect the administration of justice, e. g. by authorizing magistrates on a municipal prosecution to state a case; *Germiston Municipality v. Angehrn & Piel*, [1913] T. P. D. 135.

<sup>2</sup> A Council may not legislate before the date fixed (*R. v. Whiteside*, [1914] E. D. L. 173), nor can the Governor-General validate an irregular ordinance (*R. v. Williams*, [1914] C. P. D. 277; *R. v. Fox*, [1912] E. D. L. 310; *R. v. Sher*, [1914] T. P. D. 270).

At the same time provision was made for the grant of regular subsidies towards the annual expenditure of the provinces of a total of half the ordinary expenditure subject to certain limits as to increase of such expenditure. Further, certain revenues of the Union after collection were to be paid to the provinces, namely, those derived from transfer duties in respect of immovable property, liquor licences, and, in the case of the Transvaal, native employment licences. In the case of Natal a special grant was made, equal to the amounts derived by the municipal and local authorities from trading and liquor licences. In calculating expenditure, the sum paid by divisional councils, school boards, or native councils, as in the Cape, out of local revenue, were to be counted. Grants of £100,000 annually were allocated to the Orange Free State and Natal to make up their lack of revenues. Capital expenditure was to be met by loan from the Union only, at such rate of interest and sinking fund as might be prescribed by the Union, these charges to count as part of the expenditure for purposes of subsidy. A distinction was laid down by the Act between capital and normal expenditure, to ensure that minor repairs should be met from normal expenditure.

The authority of the provinces as to taxation<sup>1</sup> on their own account was defined. They were allowed to derive revenue from certain fees, dues, and licences, including hospital fees, education fees in respect of elementary education, totalizator fees, auction dues, game licences, certain dog licences, trade licences, and other miscellaneous receipts. The power of the Council in these matters was extended to altering existing Union laws in respect thereof. But a Council was forbidden to make an ordinance relating to licences to trade so as to take away any right existing at the commencement of the Act to appeal to a court of law against a refusal to renew any licences, this

<sup>1</sup> The provinces can authorize municipalities to raise rates, and can invalidate (Transvaal Ord. No. 1 of 1916, s. 12) any contract providing for the transfer of obligation to pay owner's rates to a lessee; *Marshall's Township Syndicate v. Johannesburg Consolidated Investments Co., Ltd.*, [1920] A. C. 420. The power to impose a poll-tax on natives (Transvaal, 1921, No. 7, c. 2) was ruled invalid in *Transvaal Province v. Letanka*, [1922] A. D. 102. Municipalities can be authorized (e.g. by Transvaal Ord. No. 9 of 1912) to differentiate between white and coloured persons or Asiatics as to use of trams; *George v. Pretoria Municipality*, [1916] T. P. D. 501.

being intended to preserve the appeal given to British Indians against the refusal of Natal municipal bodies to renew existing licences. On the other hand, the Councils were forbidden to obtain revenue or make ordinances in respect of licences for commercial travellers ; companies or banks ; insurance or friendly associations ; newspapers ; gold dealers ; brokers or cutters of precious stones ; prospecting for metals ; manufacturing cigarettes ; dealing in arms, ammunition, or explosives ; engagement or recruitment of natives ; or the ownership or use of boilers ; nor might a province exact such licence fees as might be exacted by any municipal or local authority.

The system thus inaugurated was extended by Act No. 9 of 1917 with the grant of additional powers to the provinces to license, regulate, and control places of amusement, and to raise taxation in respect of such licences. Moreover, greater generosity as regards the ranking of expenditure for subsidy was introduced, the increase permitted being 15 per cent. on education—the great subject of expenditure—and 5 per cent. on other matters. In 1921 financial stringency resulted in refusing any increase of subsidy beyond that of the previous year, save for recognition of 5 per cent. increase on education account. More drastic measures were requisite in 1922, when Act No. 5 limited the subsidy to 90 per cent. of that in the preceding year, and allowed no more than a 3 per cent. increase for years subsequent to 1922–3. The difficulties of the provinces were now such that the Cape, finding that the Council would not approve a Sales Tax, applied for assistance to the Union, while the Transvaal, after it had lost its right to tax gold profits, devised first, by Ordinance No. 8 of 1922, a tax on employers, and in 1923, by Ordinance No. 8, a tax on financial companies, but was glad in 1922 to accept, like the Cape, a loan of £300,000, while the Baxter Commission was set up to inquire into provincial finance.

The Commission reported in 1923 utterly condemning the system of payment of subsidies on the proportional system as encouraging extravagance. It held also that education was too expensive, teachers overpaid, too much spent on buildings, bursaries, hostels, industrial and technical education, high schools, waste in administration and inspection. It condemned several of the sources of taxation already enjoyed by the provinces, proposed an alternative list of taxes suitable for provincial

administration, including liquor licences ; dog, fish, and game licences ; motor taxes ; wheel tax ; entertainment tax ; taxes on racing (totalizator, betting, bookmakers, race-course admission) ; immovable property tax ; education fees for other than compulsory education ; and hospital fees. Transfer duty should remain an assigned revenue. The list of sources of revenue inappropriate for provincial administration included native pass fees ; trade and occupation licences ; auction dues ; poll tax ; education tax ; crayfish canning profit tax ; corporation and company tax ; employers' tax. Trade and occupational licences should be made uniform by Union legislation. To make up for loss of revenue the provinces should receive a definite subsidy, based on the cost of education on the theory of an allowance per head of average attendance. Loans should be made to meet the deficits of the provinces, and, in the Cape, of the school boards, to be repaid in ten years. Loans should be provided by the Union as before, but the school authorities should be deprived of power to borrow. Co-operation between the central and provincial Governments was strongly urged, and the creation of local authorities with definite responsibilities for education, hospitals, and roads, and with rating powers, the chief object to be immovable property ; such authorities were specially needed in the Transvaal and Orange Free State, in view of the scanty development there of local government. The Commission, however, insisted that it was not competent to make final recommendations on educational policy, and that matter was given to another Commission, which reported in favour of compulsory education for all European children from age 7 to 15, recommending that the Government should assume the complete cost of such education so far as it was reasonable, adopting the basis of per head rates fixed by the Finances Commission. The reports of these bodies were discussed in January 1924 by the Union Government and the provinces. The result was negative, Natal refusing to accept the £14 per head grant recommended as adequate, while all were agreed in denouncing the essential suggestion of the Commission for a tax on land, which the Boer regarded as almost sacrilegious. The Government, therefore, brought a Bill which accomplished little more than making uniform teachers' salaries as a means of economy, and its failure to grapple with the problem

unquestionably helped its reverse at the general election. The new administration naturally did nothing in the first session, but in November 1924 held a conference with the provinces which resulted in agreement as to the principle of basing the subsidy on educational costs, though the important suggestion by the Commission on Education that there should be created a Union Board of Education with powers of co-ordination was rejected. The compromise reached was ultimately embodied in the *Provincial Subsidies and Taxation Powers (Amendment) Act, 1925, No. 46*.

The provincial subsidies are based under the Act on (1) grants at various rates defined in Schedule 2 in respect of non-native pupils or students who are being educated or trained in schools or colleges maintained or aided by the provinces, other than students undergoing secondary education proper,<sup>1</sup> and (2) grants for native education. A lump sum of £340,000 is provided for the latter purpose, which is paid into the Native Development Fund,<sup>2</sup> and from that grants will be made by the Governor-General in Council, after consultation with the Minister of Native Affairs and the Administrator of each province. The subsidies are payable in the year when they fall due, but not more than five-sixths may be paid in the first nine months, and the balance only on a certificate by the Provincial Auditor of the correct sum due. Natal and the Orange Free State are given special subsidies of £75,000 a year. To relieve immediate difficulties the deficits at 31 March 1925 in the provincial accounts were made loans from the Union repayable with interest at 5 per cent. in ten years, but the provinces were made liable for pension contributions under pre-Union Acts in respect of provincial officers. A new schedule is provided, specifying the sources of provincial revenue other than subsidies, and in respect of matters therein enumerated the province is given legislative power, any other legislative power to raise taxation being negated. The heads enumerated are (1) hospital fees and fees received in respect of education; (2) licences for dogs outside urban areas, to take game, or fish, or sell game, or pick

<sup>1</sup> See s. 11 of Act No. 5 of 1922 as extended by s. 14 of the Act of 1925.

<sup>2</sup> Created in 1925, a poll-tax on male natives of £1 being imposed, where income tax is not payable, four-fifths going to the Treasury and one-fifth to the fund.

or sell wild flowers ; (3) motor or mechanically propelled vehicle licences ; (4) wheel tax on any vehicles ; (5) amusements or entertainments tax ; (6) auction dues ; (7) totalizator licences and betting tax ; (8) taxes on persons, other than companies, and on their incomes ; (9) tax on companies, other than mutual life insurance companies ; (10) tax on ownership of immovable property but not on transfer or sales thereof ; (11) licences in respect of importation for sale of goods from beyond the Union, subject to a maximum of £310 ; (12) miscellaneous receipts in respect of matters entrusted to the province. Income tax is limited to 20 (or 30 if unmarried) per cent. of the amount of Union income and super tax levied on the portion of income derived from sources within the province, company tax to 6*d.* per £1 of taxable income arising within the province, but the Transvaal, which is deprived of the employer's tax raised under Ordinance No. 8 of 1922, is permitted to levy up to a shilling per £1 on the profits of financial companies under Ordinance No. 8 of 1923. It is further provided that, if any of the assigned revenues are collected by the Union Government, they are to be paid over to the Provincial Revenue Fund with or without deduction for cost of collection as may be arranged. The difficult question of licences to exercise a trade, profession, or occupation is dealt with by giving the Union Parliament alone the power to fix the amounts to be paid for such licences, but the amounts raised in each province are payable to the province, and the province may authorize a municipality to exact fees in respect of any trade or occupation which for special reasons it considers should be subject to inspection or supervision by the local authority. Moreover, the provinces remain fully competent to regulate the issue of licences and to provide for inspection, registration, and control of licences, subject only to the preservation of any right of appeal to a court of law against a refusal to renew a licence in existence on 1 April 1913.

The Act also adds town planning to the matters which may be placed under provincial authority, and extends power as to control of townships in Natal, and generally as to Crown lands transferred with places of public resort or of scientific or historic interest.

Control over the finances of the provinces is provided by the creation in each of a Provincial Revenue Fund into which are

paid all revenues raised by taxation or transferred by the Governor-General in Council. No appropriation can be made except under warrant signed by the Administrator, and such warrants can be issued only in respect of moneys authorized to be expended by ordinance, and no ordinance can be made without a specific recommendation of the sum proposed to be appropriated by the Administrator. Further security is provided by the appointment of an auditor by the Governor-General, who can be removed only for cause assigned and communicated within a week to Parliament. He audits the accounts under the control of regulations made by the Governor-General in Council and his counter-signature is essential to any warrant of the Administrator for the issue of money. But by the Act of 1913 the necessary power is given to the Administrator to authorize payments on emergency, but not to a total exceeding £25,000, and the matter must be laid before the Council at its next meeting.

It is clear that in practice the Councils have not in the least fulfilled the hopes of their creators that they would avoid politics. The idea in constituting the Executive Committees by proportionate representation was to discourage political parties, to save dissolutions, and to prevent the following of the practices of Cabinet Governments. But in fact, as the electorate was the same as in the case of the Parliament, it was inevitable that the party system should be applied, at least in the Cape and the Transvaal,<sup>1</sup> where the comparatively large number of members—now 51 for the Cape and 50 for the Transvaal as opposed to 17 each for the small provinces—encouraged political strife, and the electorate presented racial and political diversity of ideals. The result was the adoption in the Council of the party system, caucus meetings, whips, party speeches, &c. But the constitution of the Committees had the disadvantage of preventing the composition of the Councils having the usual political results. As not liable to retire on political grounds, the

<sup>1</sup> When in 1914 Labour won control in the Transvaal, an effort was at once made to transfer by ordinance the powers of the Administrator and Executive Committee to select committees of the Council, a step quite *ultra vires*. In 1915 three Hospital Ordinances and an Education Ordinance were not assented to. Ordinance No. 3 of 1915 made approval of the Council necessary for all educational regulations; No. 14 of 1917 restored the old rule of mere power to disapprove.

Committee has normally patched up its disagreements on the basis of give-and-take without logic—or justice—and the people have felt just indignation at their inability to secure a clear-cut policy, save in those cases, such as Natal and the Free State, where one party is predominant, and there is no real Opposition. On the other hand, in the Cape and the Transvaal the provincial elections of 1923 resulted in the return of parties so balanced that the Cape and Transvaal Councils elected Committees with two members of the South African party and two Nationalists, putting the deciding power into the hands of the Administrator. This officer thus becomes, as in the Cape, the real Government, which was neither intended nor desired. Moreover, the presence of political feeling on the Councils is wholly unfavourable to smooth working, as was seen in the period 1920–3 when the Transvaal Committee was composed of two Nationalists and one Labour supporter to a member of the South African party. One aspect of the situation was shown on 29 July 1924, when General Hertzog was questioned on the position of Administrators. He laid down the view that in choosing an Administrator, who must according to the Constitution preferably be chosen from the residents of the province, it was proper to appoint some person who was in general harmony with the views of the majority in the province at the time of his appointment. He need not, therefore, necessarily be in harmony with the views of the Government of the Union for the time being, so long as he was content to work loyally in the duties of his office. This was further elucidated by the contrast drawn between the Administrators and the head of the Government of South-West Africa, it being made clear that in this case it was essential that he should be in close harmony with the Union Government. The distinction rests on the essential fact that the Administrator ought primarily to act on the wishes of the people as represented by the majority in the Council, while the head of the Administration in South-West Africa acts as the representative of the mandatory power.

The financial position of the provinces is clearly unsatisfactory, as there is too much divorce between the provision of funds and the responsibility of spending them. It is natural that there should have been suggestions for the reduction of the provinces to the status of local councils ; one Commission



in 1917 suggested that there should be created seven bodies of this sort in the Cape, four in the Transvaal, two in the Orange Free State, and one in Natal, whose primary business would be education, the Government finding 80 per cent. of the cost and training the teachers, while the minor functions of the Provincial Governments would also be carried out by them. But such a solution ignores the strong local preference for the existence of Provincial Governments and Legislatures. There is no difficulty in the destruction of the whole machinery of provincial government; it can be abolished, as it has been amended, by mere Act of the Parliament, which must indeed be reserved, but it is not to be supposed that any difficulty would be experienced in according Imperial sanction to the proposal. It was inserted mainly to gratify the feelings of Natal, which is as insistent as ever on the need of local autonomy, and which has never ceased to regret that the Constitution was not made federal.

The Imperial Government has no control over provincial legislation, other than the power to move the Union Government to consider representations regarding any exercise of power likely to have unfortunate effects on Imperial relations. The chief source of friction has been the dead set against the grant of licences for trading to Indians made especially in Natal, and the decision to decline to allow Indians the municipal franchise. Matters of this kind are, of course, specially reserved for the consideration of the Union Government under s. 147 of the *South Africa Act*, and that Government admits its responsibility for seeing that the powers of the provinces are not misused, though it insists that it is not entitled on matters of mainly local concern to persist in opposing the wishes of the people.

It is worth noting that the provincial arrangements in the Union had a faint forerunner in the provinces created in New Zealand under the Act of 1852.<sup>1</sup> In that case also the Colonial Parliament had full power to legislate even on provincial matters,<sup>2</sup> and an Act of 1868<sup>3</sup> gave it the right, exercised in 1875,<sup>4</sup> to abolish the provinces. The Councils of the provinces were elected by the same electors as for the House of Representatives, and had a duration of four years, with annual

<sup>1</sup> 15 & 16 Vict. c. 72, ss. 2-31.

<sup>2</sup> s. 53.

<sup>3</sup> 31 & 32 Vict. c. 92.

<sup>4</sup> *Abolition of Provinces Act*, 1875; *Parl. Pap.*, 1876, A 2. A.

sessions ; they were liable to dissolution by the Governor, but not by the Superintendent who acted the part of Administrator, but was elected as soon as might be after the dissolution or expiry of each Council by the electors for the Council. His election could be disallowed by the Governor, and he could be removed from office on an address from the Provincial Council. His functions were in effect those of a Lieutenant-Governor, and he acted on that principle, appointing and dismissing ministers for provincial affairs. He had the right to assent to, reserve, or disallow, legislation ; the Governor could also disallow or assent to reserved Bills in three months, a provision inserted in the Imperial Act in its passage through Parliament, and depriving the Imperial Government of effective control over legislation by the provinces. The Council had legislative powers on all matters of provincial interest, excluding customs ; Courts civil or criminal, save as regards offences punishable summarily ; currency ; weights and measures ; the post office ; bankruptcy ; beacons, lighthouses ; shipping dues ; marriage ; Crown lands or native lands ; legislation differentially affecting non-Europeans ; criminal law, save as regards summary punishment of offences ; the law of inheritance and wills. On the whole, the provincial system proved needlessly clumsy and cumbrous, and its replacement by a system of municipal government was not seriously regretted.

### § 5. *The Judiciary*

General Botha in 1907<sup>1</sup> at the Imperial Conference pressed for the creation in South Africa of a Court of Appeal to obviate the multiplicity of appeals then possible to the Privy Council, and to render more regular the interpretation of the common law of South Africa, Roman Dutch law. The Act of 1909 met fully this desire by creating a single Supreme Court for the Union, consisting of an Appellate Division with head-quarters at Bloemfontein, four Provincial Divisions absorbing the Supreme Courts of the Cape, the Transvaal, Natal, and the Orange River Colony (styled there High Court), and local divisions comprising the Court of the Eastern Districts of the Cape, the High Court of

<sup>1</sup> *Parl. Pap.*, Cd. 3523, pp. 207 ff., Cd. 5745, p. 230 ; *The Government of South Africa*, i. 56 ff. ; ii. 14 ff. On the old Courts and reforms, see Walker, *Lord de Villiers*, pp. 72 ff., 97 ff., 420, 438, 489, 493 ff.

Griqualand, the Witwatersrand High Court, and the Circuit Courts of the four provinces. These provincial and local divisions retain their existing jurisdiction, and receive further original jurisdiction in all cases in which the Union is a party, or in which the validity of any provincial ordinance is called into question. These Courts are given also jurisdiction in cases of electoral petitions in respect of the House of Assembly and Provincial Councils.

As regards appeals it was provided that in every case where under the colonial constitutions an appeal lay to the Supreme Court of a colony, i.e. in the Cape from the Courts of the Eastern Districts and Griqualand West, in the Transvaal from the Witwatersrand Court, and in Natal from the Native High Court, and in all provinces from the Circuit Courts, appeal lies only to the Appellate Division. There is, however, an exception in the case of orders or judgements given by a single judge upon applications by way of motion or petition, or on summons for provisional sentence, or on judgements for costs only ; appeals in such cases and in cases of criminal appeals, and on points of law reserved, shall lie to the corresponding provincial division, when no further appeal can be taken except by permission of the Appellate Division, save indeed if the parties agree to dispense with any intermediate appeal. Appeal lies also from the High Court of Southern Rhodesia, which is anomalous but convenient, as that colony enjoys Roman Dutch law,<sup>1</sup> and it would be foolish to deprive it of the advantage of the decision of matters by so experienced a Court. Appeals lie also from the Swaziland Court, and under s. 4 of Act No. 12 of 1920 from the High Court of South-West Africa. Further, appeals which lay under the old law from the Supreme Courts to the King in Council now lie to the Appellate Division, but the old restrictions on the limits of value of the thing in dispute, or the amount of the award, are not applicable to this appeal. Appeals from Courts of a resident magistrate or other inferior Court in civil and criminal matters lie to the appropriate division of the Supreme Court, without further possibility of appeal, save with the permission of the Appellate Division. From the Supreme Court no appeal lies to the King in Council, save to the extent that an appeal may

<sup>1</sup> For the preservation and extension of this law, see Walker, pp. 74 ff. In 1891 the law was extended to the Zambezi.

be brought by special leave ; Parliament may make laws limiting matters in respect of which such an appeal may be sought, but this is subject to the obligation of reservation of such a Bill. This prohibition has no reference to appeals under the *Colonial Courts of Admiralty Act*, 1890.<sup>1</sup> The restriction, though unusual, is in harmony with the finding of the Colonial Conference of 1907 in favour of appeals from the South African Colonies coming only from one Court of Appeal. There is, of course, a special propriety in the decision, because the Privy Council is inevitably not very strong in matters of that quaint survival, Roman Dutch law.

The Act transferred the existing judges to the appropriate divisions of the Supreme Court, giving the style of Judge Presidents to the former Chief Justices, with permission to retain the former style for the duration of their appointments ; the power to create new judges, including the Chief Justice of South Africa—the appointment to which office was conferred on Lord de Villiers—was given to the Governor-General in Council. The Appellate Division was primarily to consist of the Chief Justice, with two ordinary judges of appeal and two additional judges assigned from the provincial or local divisions, but by Act No. 12 of 1920 two further ordinary judges were substituted, the belief recorded in the Act of 1909 that the number of judges required could be reduced turning out to be idle. Five members of the Court must sit on an appeal from two or more judges, in other cases three, but no judge may sit on appeal from himself. The process of the Court runs throughout the Union, and its judgements or orders fall to be executed as if they were issued by the provincial division of the Supreme Court. Similarly, it was provided that the judgement or order of any provincial division might be executed in any other division by production of a certified copy to the registrar, and proof that the judgement or order was not satisfied, while each provincial or local division was given authority to transfer cases to another division if of opinion that they could more conveniently be tried therein. The power of making rules of procedure was given by the Act to the Chief Justice and ordinary judges of the Appellate Division, and to the Chief Justice and judges of the Supreme

<sup>1</sup> So in Canada ; see *Richelieu and Ontario Navigation Co. v. Owners of SS. Cape Breton*, [1907] A. C. 112.

Court, subject to the approval of the Governor-General in Council. Bloemfontein was made the normal seat of the Appellate Division. By legislation of 1918<sup>1</sup> the further power was given to the Appellate Division to admit appeals from decisions in case of election petitions, an unexpected power, as appeals in this regard are not encouraged either in Canada,<sup>2</sup> or the Commonwealth, or by the Privy Council.

The Native High Court of Natal exists under Colonial Acts<sup>3</sup> which constitute it of a Judge President and three judges. Its function is to try serious offences committed by natives, including capital offences, and its jurisdiction is exclusive of any other Court. Appeal lies to the Appellate Division, but on a point of law reserved to the Natal provincial division of the Supreme Court. The *Criminal Procedure and Evidence Act*, 1917, gives permanent existence to a special Criminal Court first constituted under Act No. 27 of 1914, which allowed of the trial by two or three judges without a jury of treason, sedition, public violence, and certain crimes arising out of industrial disputes, it being held that the usual provision of a jury trial—in which seven persons out of the nine must agree in the verdict—would be unwise. The Act of 1917 added to the cases in which the Attorney-General could apply for the creation of the Court offences connected with illicit dealing in, or possession of precious stones or metals, and the supply of intoxicating liquor to natives or coloured persons, while Act No. 6 of 1922 gave extra powers to try offences arising out of the rioting and rebellion of that year.

In substitution for the old system of Attorneys-General in each Colony as political members of the Ministry, the administration of justice was by s. 139 placed throughout the Union under the control of a Minister of State,<sup>4</sup> in whom were vested all powers, authorities, and functions which at the establishment of the Union were vested in the Attorneys-General of the Colonies, save those powers relating to the prosecution of crimes

<sup>1</sup> No. 12 of 1918, s. 132.

<sup>2</sup> The Court of Appeal in Ontario ruled (18 Dec. 1925) that no appeal lay from the order of a judge of the Supreme Court in the *North Huron Election Case*; 29 O. W. N. 277; 4 *Can. Bar Rev.*, 124 ff.

<sup>3</sup> No. 49 of 1898, ss. 29–31; No. 47 of 1901, ss. 5, 6; No. 30 of 1910, ss. 1, 2.

<sup>4</sup> For de Villiers' view, see Walker, p. 100.

and offences which in each province were vested in an officer appointed by the Governor-General in Council, under the style of the Attorney-General of the Province, who was also to discharge such other duties as might be assigned to him by the Governor-General in Council. The Solicitor-General for the Eastern Districts of the Cape continues to exercise the powers vested in him at the establishment of the Union ; the Crown Prosecutor of Griqualand West, however, lost office under Act No. 27 of 1912.

The Constitution conferred upon the advocates and attorneys entitled to practise before any provincial division the right to appear before the Appellate Division, but did nothing to amalgamate the profession in the Union. Nor has legislation for this purpose since been enacted, though by Act No. 7 of 1923 women were admitted to all the divisions on the same conditions as men.

### § 6. *The Civil Service*

The Act of 1909 provided fully for the reorganization of the Civil Service. It took the somewhat unusual course, appropriate, however, to a unitary constitution as compared with those of Canada and Australia, of transferring the officers to the public service of the Union. The Governor-General in Council was required to appoint a Commission, which was duly formed in 1910, to advise as to the reorganization and readjustment of the service, and the transfer of officers to the provinces. On their recommendation the Government was authorized to make the transfers, and in the meantime to lend the necessary officers to the administrations. It was also provided that a Commission must be established on a permanent basis to deal with the appointment, discipline, retirement, and superannuation of officers. Officers for whose services no use could be found were to be entitled to retire with compensation on abolition of office, according to the rule in force in the Colony in which they had been employed ; other officers taken over were allowed to retire at the age and on the pension appropriate under colonial law. Special provision was to be made for the permanent officers of the old Parliaments whose services were not required by the Union Parliament. The officers of the Railway and Harbour Board were, however, exempted from the general provisions of

the transfer. As a safeguard in the new era of bilingualism, resulting from the provision for the treatment of English and Dutch on an equality, it was provided by s. 145 that the services of any officer in the colonial services when transferred should not be dispensed with on the ground of want of knowledge of English or of Dutch.<sup>1</sup>

### § 7. *Financial Provisions*

All revenues from any source over which the Colonies had power of appropriation were by s. 117 vested in the Governor-General in Council. Further, two funds were provided for, a Railway and Harbour Fund, to receive all revenues from railways, ports, and harbours, and to be the source of funds for expenditure on these ends, and a Consolidated Revenue Fund, on which was to be charged the interest on the public debt, the cost of collection being left to be appropriated, while the Governor's salary is also charged on the fund. From neither fund can any sums be withdrawn save under the authority of law. All stocks, cash, bankers' balances, securities, Crown lands, public works, immovable and movable property, mining and other rights of the Colonial Governments were vested in the Governor-General in Council, subject to any liabilities specifically charged upon them, and the whole of the debts were taken over as they stood, with all obligations affecting them. In both these respects the unitary character of the Constitution is clearly shown. The transfer of mining rights was alleged as an argument against the validity of the gold profits tax imposed by the Transvaal Legislature in 1918, but this contention was naturally held to be invalid by the Supreme Court. Temporary provision was made for dealing with the provinces, which were to derive their revenues in the first instance from grants from the Union, pending consideration by a Commission, which, as mentioned, duly reported with the result of the passing of the *Financial Relations Act*, 1913.

The provisions regarding the Railway and Harbour Board

<sup>1</sup> Want of knowledge of native languages is a marked defect of the service, which is over-bureaucratic and recruited on a low standard; see Nathan, *South African Commonwealth*, pp. 149-52, 357 f. Grave disadvantages result from the existence of two places of government, administration in Pretoria, legislation at Capetown.

were in part a continuation of the Railway Board of the Central South African Railways, partly an imitation of the Commissioners who managed the railways in Australia, partly an amalgamation with the system of governmentally owned ports in the Cape and Natal.<sup>1</sup> The aim of the special board was intended to secure that the railways and ports should be run on economic principles as compared with the use of public revenue to make good deficiencies. But characteristically there was no deviation from the doctrine of ministerial responsibility. The Constitution provided for the control of the railways, ports, and harbours being exercised through a Board of three Commissioners or less, appointed by the Governor-General in Council, and a Minister of State who was to be Chairman. In 1916 the purpose of the Constitution was more precisely defined to mean that they should be administered and worked under the control and authority of the Governor-General in Council, to be exercised through a Minister of State, who shall be advised by the Board. The management and working of the railways and harbours shall, subject to the control of the Minister, be carried out by the General Manager, who shall be governed by such regulations as the Minister may from time to time frame after consultation with the Board. The Board, on this definition, becomes an advisory body, consulted by the Minister on matters of high policy, which does not claim the right to direct technical operations. The railways, ports, and harbours are to be administered, as has been mentioned, on business principles, but also with a view to promote industrial and agricultural settlement, which are hardly consistent objects, and the employment of white unskilled labour has been declared by the Controller and Auditor-General to be contrary to the constitutional requirement of business management. No new railway, port, or harbour can be constructed until the project has been reported on by the Board, and, if the Board holds that the returns will not meet working expenses, maintenance and interest on capital borrowed for the work, it may frame an estimate, which when

<sup>1</sup> Under Act No. 20 of 1922 the railways and harbours in South-West Africa became an integral part of the Union system and are controlled by a Divisional Superintendent at Windhoek, directly responsible to the General Manager. For the pre-Union system, see *The Government of South Africa*, i. 198 f.; ii. 131 ff., 138-47 (as to the funds in pre-Union times).



approved by the Controller and Auditor-General entitles the Board to have the loss up to the amount of the estimate made good from the consolidated revenue. Similarly the Board can exact repayment in respect of unremunerative services undertaken by reason of the demands of the Governor-General in Council or of Parliament.

The Constitution was unique <sup>1</sup> in providing for the appointment of a Controller and Auditor-General with tenure during good behaviour, removable by an address from both Houses. He may, however, be suspended by the Governor-General in Council for misbehaviour or incompetence, if Parliament is not in session, and the suspension is confirmed unless an address is passed by the two Houses in the ensuing session asking for his restoration.

Free trade throughout the Union was specifically provided for, but otherwise the tariffs were left in force until modified by Parliament. As a transitory provision, arrangements were made to charge the consolidated revenue fund with payments to be made to Bloemfontein and Pietermaritzburg in consolation for the loss of status as colonial capitals. Moreover, as part of the arrangement for union, the Transvaal has undertaken to secure to the Cape and to Natal 20 and 30 per cent. of the railway traffic, the rest to go to Delagoa Bay, and this arrangement received incidental sanction in the Act, which recognized expressly in s. 148 (2) <sup>2</sup> the new bargain of 2 February 1909 with the colonies, rendered possible by a fresh agreement with Mozambique.<sup>3</sup>

### § 8. *Treaties, Naturalization, and Language*

It is expressly provided by s. 148 (1) that all rights and obligations under any conventions or agreements which were binding on any of the colonies should devolve upon the Union at its establishment. This was, of course, a mere assertion of the obligation of the Union to secure the observance of the obligations of the Crown in respect of any of the colonies. It

<sup>1</sup> Ordinary Acts provide in other cases, e. g. Canada, *Commonwealth Audit Act*, 1901-24, s. 7, which rests on State Acts as models; New Zealand, &c. The Irish Free State (ss. 62, 63 of the Constitution) also provides by statute, No. 1 of 1923. For the old Colonies, see *The Government of South Africa*, i. 320.

<sup>2</sup> *Parl. Pap.*, Cd. 4721, p. 3.

<sup>3</sup> *Parl. Pap.*, Cd. 4587 (Art. xxiii).

is true that occasionally in the case of federations<sup>1</sup> it has been contended that old treaties are abrogated if they are inconsistent with federation, but this doctrine, which may apply to sovereign states, clearly lacked force when applied to mere changes in territorial groups in the Empire, and the contentions at one time advanced in this sense on the Commonwealth of Australia were never taken seriously by the Imperial Government, and the Commonwealth itself rapidly recognized that the position was untenable. The obligation, of course, applies merely to the extent that it formerly applied; it is not by the Act extended to the whole of the Union; to do so would require a fresh international agreement. Difficulties, indeed, might have arisen in view of the fact that by international law various Imperial treaties applied to the conquered colonies before union, but the point did not arise in practice. In Canada s. 132 merely gave power to the Parliament to legislate, without enunciating the truism that the agreements of pre-federation time were binding on the Dominion, and it was never contended that the Anglo-Belgian treaty of 1862 or the convention with the North German Confederation of 1865, which compelled the colonies to treat these powers as favourably as the United Kingdom, were not binding on the Dominion.<sup>2</sup> No special power to legislate, of course, was requisite in the case of the Union, which, unlike Canada and Australia, has the position of a unitary power in regard to Labour conventions agreed to under the procedure of the League of Nations Labour clauses.

S. 138 of the Act went beyond Canadian<sup>3</sup> or Commonwealth<sup>4</sup> precedent in giving persons naturalized under the law of any colony the status of a naturalized person throughout the Union. The propriety of the rule was evident, and in the other two Dominions the result was brought about by legislation under their powers of enactment. The original draft was intended to limit the operation of the new rule to Europeans, but happily the fundamental absurdity of having a Union in which

<sup>1</sup> Commonwealth Government in *Parl. Pap.*, Cd. 3826, p. 6; Cd. 4355, p. 12.

<sup>2</sup> *Parl. Pap.*, C. 7553, pp. 53 ff.; Cd. 1630.

<sup>3</sup> 30 Vict. c. 3, s. 91 (25).

<sup>4</sup> Const. s. 51 (xix), carried out by *Naturalization Act*, 1903. For the Union, see Act No. 4 of 1910. A *British Nationality in the Union and Naturalization and Status of Aliens Act*, 1926, follows the principles of the Imperial Acts, 1918-22.

a man might be a British subject in the Transvaal, but an alien in Natal, struck the Convention and the necessary change was made in the Act. All Union legislation, of course, has been based on the doctrine of uniformity. But the Act contained no provision regarding freedom of intercourse between the different provinces, and, as will be seen later, such freedom is denied in the case of Asiatics and is subjected to restrictions as regards natives. This contrasts strikingly with the rule of the other two Dominions that there are no provincial or state boundaries as regards intercourse.

The language agreement in s. 137 provides that both the English and the Dutch languages shall be official languages of the Union and shall be treated on a footing of equality and shall possess and enjoy equal freedom, rights, and privileges ; all records, journals, and proceedings of Parliament shall be kept in both languages, and all Bills, Acts, and notices of general public importance and interest issued by the Government of the Union shall be in both languages. The arrangements were agreed to with much reluctance by some of the English delegates, who recognized that it was demanding for Dutch much more than it ever had been accorded. In the Cape it had enjoyed a fair amount of consideration, but never equality, in Natal it had had no rights, and even in the Transvaal and the Orange River Colony it had not been fully equal. The new position conceded to gratify Boer feeling was artificial and unreal, because the real language of the people was not Dutch but Afrikaans. General Hertzog, however, held that the terms of the Constitution justified him in seeking to give Dutch not merely a position of equality, but one of predominance, and under his aegis the Government of the Union was rapidly being hurried into a fatal position, when General Botha, by securing his removal from the Government, succeeded in restoring a reasonable compromise.<sup>1</sup> In the Orange Free State the effort to make Dutch compulsory was modified, while the other provinces in return made efforts to promote further the study and use of Dutch. The essence of the compromise that up to the fourth standard the child should be taught in the home language, though the parent might demand that it should also gradually

<sup>1</sup> *Parl. Pap.*, Cd. 6091, pp. 81, 86 f. ; Keith, *Imperial Unity and the Dominions*, pp. 489 f. On the language issue, see Walker, *Lord de Villiers*, pp. 278 ff.

be accustomed to learn through the medium of the other. After the fourth standard both languages were to be used, unless the parent preferred that one only should be employed, and, if there were enough pupils, there must be arrangements for separate classes for instruction. Moreover, the teaching of the non-home language was to be regular unless parents objected. Teachers were in future to be expected to pass the highest examination in both languages with a higher standard on one, though no existing teachers, otherwise competent, were to lose office or be otherwise penalized, if efficient, by reason of lack of knowledge of one or other language. The effort thus was to begin to make the country bilingual, without regard to the unsatisfactory effects of an education which for the Boer children meant acquiring through the medium of one or other of two really strange languages. Fortunately the absurdity was early recognized, and from 1914 the Provincial Councils approved the use of Afrikaans<sup>1</sup> in the elementary schools as an alternative, with the result that by 1925 it could be asserted that Afrikaans was in regular use through the elementary schools, and Netherlands was employed only in certain secondary classes. Parliament in 1918 accepted by resolution the view that Afrikaans was included in Dutch, but did not extend this generosity to Bills, Acts, and official papers, though, when *Hansard* was re-issued, speeches used to be recorded in Afrikaans. The Universities also allowed questions to be answered in Afrikaans, and from 1910 in Holland the language was admitted for use by Dutch-speaking South African students. When, however, the proposal to use the same language in Acts, &c., was brought up in 1925 a good deal of opposition showed itself, stress being laid on the fact that the Courts used Netherlands, and that it would be very inconvenient to seek to amend in Afrikaans Acts passed in Netherlands. Moreover, it was contended that the proper mode of procedure ought to be by constitutional change, Dutch in the Act of 1909 having manifestly the sense of Netherlands. On the other hand, an effort was made to establish that the term in the Act of 1909 was deliberately vague, and covered all dialects of Dutch or perhaps, indeed, indicated merely the two forms of Dutch current in South Africa, the Taal and the Church Dutch of the Bible and higher education. It was interesting to

<sup>1</sup> Cape Ordinance No. 14 of 1918 ; No. 25 of 1919, &c.

note that the Prime Minister admitted that he was a comparatively recent convert to the use of Afrikaans, having himself been brought up on Netherlands.

The provision of the Constitution has doubtless helped distinctly the tendency to make South Africa more Dutch than English, for the learning of an inferior speech almost lacking in literature is not *per se* attractive to the possessors of a language of unparalleled compass and splendid literature, spoken more widely by far than any other European speech.

### § 9. *Entrance of New Provinces and Territories*

When the South Africa Act was passed, it was unquestionably the expectation of the colonial ministries and of the Imperial Government that the result of the Act would be to secure the territories of the British South Africa Company for the Union, much as the creation of the Dominion of Canada resulted in the acquisition of the lands of the Hudson's Bay Company.<sup>1</sup> It was, therefore, provided in s. 150 that these territories might be admitted to the Union on addresses from both Houses of Parliament on such terms and conditions as might be expressed in these addresses, and the Order or Orders in Council giving effect to these addresses were to be read as if enacted by the Imperial Parliament. It appears that the result of this form of expression would have been to give the terms agreed on a position beyond the power of the Union Parliament to alter, contrary to the general power of alteration laid down in s. 152. Thus the addition of Southern Rhodesia as a province might have created a curious constitutional position, unless the procedure as to alteration of the condition had been definitely enacted in the Order in Council and the addresses. In point of fact, not until 1923 was the question of union with Rhodesia sufficiently advanced to result in definite terms being offered as an alternative to responsible government. Under them Rhodesia was to be a fifth province of the Union, with ten members in the Lower House, subject to increase in due course to seventeen, and four elected and one nominated Senators. The Provincial Council was to consist of twenty members. There was to be freedom of intercourse for Europeans with the rest of the

<sup>1</sup> Wheeler, *Confederation Law of Canada*, pp. 755 ff.

Union, and freedom of trade. Rhodesia would receive a special extra subsidy of £50,000 for ten years, and £500,000 at least for ten years for capital expenditure, including land settlement, which would be controlled by a Board of Rhodesians, the Union freeing the land from all claims of the British South Africa Company, and acquiring its railway rights, as well as paying its mineral royalties pending their acquisition by the Government. No recruiting of natives from Rhodesia was to be permitted. English and Dutch were to be placed on a footing of equality. The terms were criticized largely because of the feeling that by the last provision Rhodesia would be brought definitely under Dutch influence, and its lands would really serve, as they were desired to serve, to provide the Union with means of settling Dutch farmers and altering the predominantly British character of the country. Further, doubt was felt as to the security of the provincial status, there being no obvious guarantee of its power to endure.<sup>1</sup> In this case the lack of federal character of the Constitution was probably a direct incentive to avoid merger in the Union, and the vote for responsible government in lieu was unexpectedly decisive, and would probably have been more so, had it not been for the greater financial ease which was suggested by the offers of the Union.

S. 151 provides for the transfer to the Union of the government of any territories, other than those of the British South Africa Company, either of or under the protection of the Crown, inhabited solely or in part by natives, on addresses from both the Houses of Parliament.<sup>2</sup> On such transfer being made, the Governor-General in Council may undertake the government of the territories on the terms laid down in a schedule to the South Africa Act. The schedule represents the views of the Imperial Government on the due handling of issues affecting the natives of the protectorates and the Colony of Basutoland under direct Crown control, and it is on the whole probable that the experiment of providing for them in this manner was a wise one, since otherwise it might have been more difficult to

<sup>1</sup> The difficulty pointed out in ed. 1, ii. 978, was accepted by Nathan, *South African Commonwealth*, p. 125.

<sup>2</sup> Mr. Keir Hardie vainly suggested that the assent of the territory was requisite; see *House of Lords Debates*, ii. 867-70; *Commons Debates*, ix. 1643 f. See Walker, *Lord de Villiers*, pp. 446 ff.

devise terms, if the Union had asked later for their surrender. It must be added that, having regard to the trend of native policy in the Union, the handing over of these territories to the Union would manifestly be a most deplorable derogation of obligation on the part of any Imperial Government, as up to the present the view of Union Governments has not been that which is always asserted for England in theory—if, as in Kenya, frequently violated in practice <sup>1</sup>—namely the doctrine of trusteeship for the natives, but that of the domination of the white race and the use of the natives in subservience to their welfare, as inherently inferior members of the human race whose capacity makes them fitted only to work for the profit of European masters, however seriously, in point of fact, their blood is diluted with that of the natives.

The territories referred to in s. 151 of the Act are the Protectorate of Bechuanaland, administered under the control of the High Commissioner for South Africa by virtue of Orders in Council under the *Foreign Jurisdiction Act*, 1890 ; <sup>2</sup> the Colony of Basutoland, which is administered in the same way under the prerogative power of the Crown to legislate by Order in Council for the government of a ceded colony ; and Swaziland, which was *de facto* if not *de iure* a protectorate of the Transvaal ; over it that country had full legislative authority, which passed on the annexation of the Transvaal to the Crown and is now exercised under the *Foreign Jurisdiction Act*, 1890. Since the Act of 1909 was passed, the administration of the British South Africa Company has ceased not only in respect of Southern Rhodesia, <sup>3</sup> but also of Northern Rhodesia, which has been constituted into a protectorate administered under the *Foreign Jurisdiction Act*, 1890, in the same way as the Protectorate of Bechuanaland, but, as the territory contains more European settlers, with a Legislative Council. In Swaziland <sup>4</sup> rash concessions by the tribal rulers have rendered the preservation of native rights difficult, but in the other lands the natives still

<sup>1</sup> See Norman Leys, *Kenya*. The official denials are palpably worthless and the whole episode deplorable.

<sup>2</sup> For the legal position, cf. *R. v. Crewe, Ex parte Sekgome*, [1910] 2 K. B. 576 ; *R. v. Staples*, 27 Jan. 1899 (therein referred to) ; contra *Reg. v. Jameson*, [1896] 2 Q. B. 425.

<sup>3</sup> *In re Southern Rhodesia*, [1919] A. C. 211.

<sup>4</sup> *Sobhuza II v. Miller* (1926), 42 T. L. R. 446 ; [1926] A. C. 518.

enjoy just treatment, while in Basutoland the regulation of the old institution of the Pitso or national gathering has developed native self-government in what is essentially a vast native reserve.

The office of High Commissioner is held together with that of Governor-General of the Union, but, as High Commissioner, the officer in question is in no wise subject to ministerial control, though the union of the offices in the same hands is deemed a prudent means of securing that the Governments of the territories shall be in cordial relations with the Union Government. Occasionally, as when Southern Rhodesia was still under the control of the High Commissioner, supervising the administration of the Company, incidents occurred which excited comment in the Union on the more just and prudent exercise of the prerogative of mercy by the High Commissioner. The High Commissioner still retains considerable powers as regards native administration in Southern Rhodesia.

#### § 10. *The Amendment of the Constitution*

The power of change included in the Constitution is very wide indeed. It is true that it must be exercised within the limitation for which the Union was created, namely the creation of a legislative union under the Crown, but, as the Constitution is unitary, the right to change is as full as in Newfoundland, and perhaps more so than in New Zealand. This, of course, was in keeping with colonial practice ; the Constitutions of the Cape and Natal allowed of unfettered change, those of the Transvaal and the Orange River Colony required reservation only as a precaution, and, though the creation of the provincial system might have been expected to result in demands for greater precision, the determination of the majority of the Delegates to the Convention to secure union led to the refusal to stereotype. S. 152 gives to Parliament the power to repeal or alter any provision for the Act ; it imposed only a disability—now spent—on provisions for whose duration, as in the case of the composition of the Senate, a definite time limit was fixed. But changes in the section itself ; in ss. 33 and 34 relative to the number of members of the Assembly until the number of members reaches 150 ; in s. 35 regarding the qualifications of electors of members



of the House of Assembly ; and in s. 137 as to the use of language, must be passed by the two Houses sitting together and be approved at the third reading by two-thirds of the total numbers of both Houses. It has already been necessary to use this procedure because as a result of war conditions it was necessary to vary the terms of s. 34 of the Act temporarily in order to secure that at the census for determining the number of members to be elected for the provinces there should be taken into account the number of military voters on whole pay who were excluded from enumeration under that section.<sup>1</sup> The vital part of the prohibitions of change, save with this majority of both Houses, is the protection accorded to the franchise of natives in the Cape by s. 35 through this procedure—however imperfect such protection may be ; while by including s. 152 in the safeguarding there was avoided the result seen both in New South Wales and Queensland, where protecting majorities were evaded by the simple device of repealing the clauses requiring them and then accomplishing by simple majorities again the end desired, no precaution having been taken to provide that the clauses themselves should be protected from repeal by ordinary majorities.

The only other protection against hasty action contained in the first draft was the requirement of reservation of any Bill amending the provisions in the schedule regarding the government of native territories transferred to the Government of the Union. At Bloemfontein, however, further reservation provisions were insisted on. It was provided in s. 64 dealing with the assent to Bills that the Governor-General must reserve any Bill altering that section itself, or any of the provisions in Chapter IV of the Act relating to the House of Assembly ; or abolishing provincial councils ; or abridging their powers, except as provided in s. 85 of the Act itself. These provisions were due to the desire of the supporters of equal electoral areas to safeguard what was left of the provision after concession of a margin of fifteen per cent. either way to meet Cape wishes, while the Natal delegates were most anxious that something should be done to express the abiding character of the provincial system as an element in the Constitution.

<sup>1</sup> See Act No. 31 of 1918 ; and as to change of census date, No. 15 of 1918. It now runs from 1921 quinquennially.

PART V

**IMPERIAL CONTROL OVER DOMINION  
ADMINISTRATION AND  
LEGISLATION**



## THE PRINCIPLES OF IMPERIAL CONTROL

§ 1. *Control over Dominion Administration*

THE control which the Imperial Government can exercise over the administrative actions of a Dominion Government is small and indirect. In the main it is clear that action in a Dominion can be taken only by a Ministry with the powers of executive action which it possesses, and that, if a Governor cannot find ministers willing to act in the sense desired by the Imperial Government, he is unable to effect their wishes. There are exceptions to this general position. A Governor might grant a pardon in defiance of ministers' advice, or refuse to grant it; he might decline to sign a land grant, where it is the custom to obtain his signature; thus in Newfoundland, as long as the French treaty rights prevented settlement being uninterrupted in the coastal area, the Governor was forbidden to sign any grant which did not contain definite reservations of French treaty rights. Or the Governor may refuse to sign a warrant for the issue of money, if there is no legal sanction for it, and in 1878 Sir M. Hicks-Beach was prepared to rule that a Governor's duty might lead him to refuse, but in 1910 the Secretary of State<sup>1</sup> did not intervene to prevent the acting Governor of the Transvaal signing the warrant which authorized the issue to members of the Legislature of a salary which they had not earned, and which would not have been approved by the Legislative Council, had that body been asked to sanction it by Act of Parliament. Or the Governor may refuse his assent to regulations to be passed in Council,<sup>2</sup> and this power has been used from time to time as a means of delaying action until the Imperial Government has discussed the proposed regulations with the local Government. Or where native chiefs are concerned a Governor may decline to approve deportation or re-

<sup>1</sup> Cf. *House of Lords Debates*, vi. 401 ff.

<sup>2</sup> Cf. Lord Minto's refusal to sign the minute dismissing Lord Dundonald from the office of G.O.C., Canada, without full consideration; Skelton, *Sir Wilfrid Laurier*, ii. 200 f.

removal from office, but in fact in 1906-7 in Natal the Governor accepted against his judgement and that of his official superior the wishes of the Ministry. On the other hand in 1906, when instructed to secure postponement of the executions of twelve natives condemned by a court martial, he did postpone the step, though his ministers resigned and the Imperial Government hastily conceded that the executions might proceed. In 1907 Sir W. Macgregor in Newfoundland had himself to arrange for the publication of the Imperial Order in Council overriding Newfoundland legislation inconsistent with the *modus vivendi* for the fishery season concluded with the United States.

In such cases as these the action of the Governor is not directed against the Ministry ; it rests on his effort to carry out the instructions of the Imperial Government, which he is bound to obey, and is consistent with his desire to remain on the most cordial terms with ministers, who will, he hopes, recognize that he cannot do otherwise than comply with his instructions. Sir H. MacCallum in 1906 was entirely on the side of his ministers, and Sir W. Macgregor had not the slightest wish to quarrel with Sir R. Bond, whose feelings in the matter of the French intervention in regard to treaty rights he fully understood. In other cases, however, there have been efforts to secure the resignation of the Ministry which carried the matter much farther. The doctrine of successive Secretaries of State<sup>1</sup> that, where a Governor is bound by Imperial instructions to refuse to take ministers' advice, the Ministry ought to feel themselves entitled to remain in office, seeing that they cannot be held responsible for failing to make their advice effective, though they are responsible to the Parliament for their actual advice, is one which rests on strong evidence. But, if the matter is carried as far as to seek to compel action as opposed to acquiescence in action by the Governor, it becomes more difficult to find any theory on which to base the constitutional position, and instances of this kind are always exceptional.

The employment of Imperial influence to press on the federation of Canada was distinctly marked in the action of Lord Monck as Governor-General<sup>2</sup> in the years before federation, who constantly pressed his ministers in a manner which would

<sup>1</sup> *Parl. Pap.*, C. 1248, p. 7 ; *Canada Sess. Pap.*, 1876, No. 116, pp. 83 f.

<sup>2</sup> Pope, *Sir John Macdonald*, i. 291 ff.

now be deemed incompatible with the respect due to them. But the case was more pronounced in the Maritime Provinces, for there there was real reluctance to federate, which did not exist in Canada. The Lieutenant-Governor of Nova Scotia was fortunate in having a Ministry <sup>1</sup> which accepted federation, and he supported it in its refusal to allow the people a voice in their destiny. In New Brunswick the Ministry in 1866 was definitely hostile, while the Lieutenant-Governor was equally definitely under instructions to use his best efforts to further federation. When, therefore, the Legislative Council, a nominee body of no great status, addressed him in favour of federation, he replied concurring in the policy, though he was manifestly under obligation to consult his ministers before taking any action. They, however, were foolish enough to resign on 13 April, opening the way to a dissolution and a fresh Ministry which accepted federation. The tactics of the outgoing ministers was deplorable, but the provocation, if not deliberate, was great.<sup>2</sup> On the other hand, Lord Carnarvon failed to induce the Governor of the Cape to follow this model in 1875. The Legislative Council of the Cape favoured federation ; so perhaps did the people, but the Assembly was adamant. Lord Carnarvon conceived the idea on 22 October 1875 <sup>3</sup> of suggesting that the Governor should dismiss the Lower House, thus achieving harmony perhaps with the Upper and the Secretary of State. It turned out, however, that the Governor <sup>4</sup> strongly dissuaded the step as ' an attempt to turn out a Ministry supported by a large and increasing majority for the purpose of dissolving Parliament on a question of Imperial policy '. He recognized clearly that to dissolve he must substitute a new Ministry for that which he had, and he was dubious as to the result of an appeal, which would have been prejudiced in any case by the fact of his intervention, even assuming that he could have found a Ministry to dissolve. Lord Carnarvon, it is fair to say, took up the view that he assumed that the Ministry would wish to advise a dissolution in the circumstances of the case, though it must be confessed that he had not a vestige of ground for such a suggestion.

<sup>1</sup> Skelton, *Sir Wilfrid Laurier*, i. 472 ; Pope, i. 358 f.

<sup>2</sup> Pope, *op. cit.*, i. 296 f. ; Hannay, *New Brunswick*, ii. 248.

<sup>3</sup> *Parl. Pap.*, C. 1399, p. 27.

<sup>4</sup> *Ibid.*, pp. 52 ff. ; Molteno, *Sir John Molteno*, ii. 40 ff.

In 1878, however, Sir Bartle Frere, in carrying out what he conceived to be Imperial policy as regards the suppression of native unrest in South Africa, felt himself called upon to secure the resignation of the Ministry of Mr. Molteno, and his action was homologated by the electorate, which gave Mr. Sprigg's Government its approval.<sup>1</sup> It remains, therefore, conceivable that in a crisis a weak Ministry, which opposed a matter of Imperial policy, might have to be dismissed, in order to allow the people to express their decision. But it must be recognized that the mere fact of removing a Ministry is in itself so violent a step that the issue would be obscured and confused by any such action and a favourable result rendered almost impossible. If the Ministry were strong in public confidence, no such action could even be contemplated, and, if there arose a case of complete deadlock between Dominion and Imperial views, the Imperial Government might either have to intervene by Imperial legislation, as in the case of the Newfoundland Fishery Order in Council of 1907, when Newfoundland law was overriden and the execution of the authority to secure America fishery rights placed in the hands of the officers of His Majesty's navy,<sup>2</sup> or the Governor<sup>3</sup> might be withdrawn in order to test the desire of the Dominion to remain a part of the Empire. Common sense suggests that the growth in status of the Dominions, and the wider views which are taken by Dominion statesmen as a result of that status, will result in the amicable settlement by arbitration if necessary of really serious differences between the Imperial and Dominion Governments. It is clear that a procedure which is suited for the adjustment of international disputes cannot with any decency be ruled out as inapplicable to those between the United Kingdom and the Dominions.

## § 2. *Control over Legislation : Mode of Exercise*

Control over Dominion legislation may be exercised in three ways: refusal of assent to a Bill; reservation of a Bill or the insertion of a clause suspending its operation until the pleasure of the Crown has been ascertained; and disallowance of a

<sup>1</sup> *Parl. Pap.*, C. 2079.

<sup>2</sup> *Ibid.*, Cd. 3262, 3754, 3765.

<sup>3</sup> Or other British representative (see Part VIII, chap. iii, § 8).

completed Act duly assented to. Of these three the first method is now almost, if not quite, obsolete.

When a Bill has passed the two Houses, it ought forthwith to be presented for the royal assent to the Governor, and no delay in such presentation is legitimate, though in Western Australia Act No. 30 of 1902 was in point of fact long held back before presentation to the Governor. It has been doubted whether a Governor should ever refuse assent, and for this may be quoted the British practice as laid down by Mr. Asquith on 2 March 1911 when speaking on the Parliament Bill. But the statement of views there was in any case too strong, because it ignored the possibility of the Government of the day advising the Crown not to assent to a Bill which had passed by some accident through the two Houses in an unsatisfactory form.<sup>1</sup> The threat of refusal of assent was used in 1858 to secure the agreement of promoters to certain changes in the Victoria Station and Pimlico Railway Bill desired by the Government, and there seems nothing in the nature of things why it should not be used again in a similar case of a private Bill, which is not a Government measure. It is, of course, a different thing in the case of a measure actually brought forward by the Government; to advise the withholding of assent would be a very strong step, and, though the Crown might well act on such advice, there is the chance that the issue would approach so closely to the point of a violation of the Constitution as to render the giving of such advice most improper. In the Dominions the power to advise refusal of assent no doubt equally exists, but it has been very little used. In 1877<sup>2</sup> the Governor of New Zealand was urged by his Ministry not to assent to the Land Bill passed in the last session of Parliament, on the score that it had been introduced by the late Government, and, though taken up by the Ministry as finally passed, it contained provisions to which the Ministry was opposed. Lord Normanby declined to accept the advice given, on the score that ministers ought to have used their influence to secure the passage of the Bill in the form they desired, and his action was approved by the Secretary of State on 15 February 1878. But the position adopted was hardly

<sup>1</sup> Todd, *Parl. Govt.*, ii. 398; Lowell, *Government of England*, i. 26; *Hansard*, ser. 3, cli. 586 ff., 691 ff., 797 f.

<sup>2</sup> *Gazette*, 1878, p. 912; *Parl. Pap.*, 1878, A. 2, p. 14.



that it was not legitimate for the Ministry to advise the withholding of assent. It was in fact a case of ordinary exercise of ministerial discretion met by the power of the Governor to decline advice when he knew, as he did in that case, that he could obtain a new Ministry at once if there was any question of resignation.

Advice to refuse assent has been tendered more freely in the case of the provinces of the Dominion ; thus in Nova Scotia at one time it was the desire of the local Government to avoid sending to Ottawa invalid Acts, and it was their practice to advise the refusal of assent to Bills which on further consideration they held to be *ultra vires* the Legislature. It has been discussed also whether in point of fact it is not preferable that refusal of assent should be advised rather than allow a Bill containing grave errors unintentionally slipped through to become an Act, though it was held in the Dominion Senate in 1910<sup>1</sup> that it was better in these cases to repeal by an Act of the same session the offending Bill and allow both, if possible, to receive assent together. A disputed case arose in regard to the action of Mr. Dunsmuir, Lieutenant-Governor of British Columbia, in refusing to assent to an Asiatic Exclusion Bill in April 1907.<sup>2</sup> Before he acted, the Secretary of State of the Dominion telegraphed to him mentioning that he had been informed by Mr. McBride, the Premier, that the Bill would not be assented to, and asking if he could rely on this being the case. Mr. Dunsmuir refused assent, and the matter was energetically canvassed in the Legislature, Mr. McBride insisting that he had not advised the withholding of assent and that the Secretary of State was responsible, while that officer declared that he had sent no instructions, although the telegram was clearly equivalent to such instructions, and was no doubt so understood by the Lieutenant-Governor. The Opposition held clearly that, if the Ministry had advised the withholding of assent, it should admit responsibility ; it conceded also that the Secretary of State could send instructions ; it denied that the Lieutenant-Governor could act on his own discretion. The Dominion point of view,<sup>3</sup> as often expressed, is that the withholding of assent is

<sup>1</sup> *Senate Deb.*, 1910-11, pp. 445 ff.

<sup>2</sup> *Canadian Annual Review*, 1907, pp. 612 ff. ; 1908, pp. 537 ff.

<sup>3</sup> *Prov. Leg.*, 1867-95, pp. 77, 105, 763, 807 ff., 915, 1018, 1048, 1225.

proper only on explicit instructions from the Dominion Government, and such withholding has been of late years very rare indeed. In the case of the provinces of South Africa the matter has been solved by giving the power of assent to the Governor-General in Council only.

There is much to be said for reservation, or its equivalent, a suspending clause, in preference to disallowance. Mr. Blake,<sup>1</sup> indeed, in his attack on the Canadian royal instructions, was strongly in favour of the rule that legislation should be completed in Canada by the assent of the Governor-General, leaving the Imperial Government to secure disallowance and eliminating the Governor-General as a factor in the dispute. His representations were accepted only to the extent that it was agreed to omit from the royal instructions any references to classes of Bills to be reserved by the Governor-General, but this, it was explained, was not to imply any abandonment of the right of reservation when deemed suitable, and as late as 1886 this form of intervention occurred. But the Canadian form of dealing with Bills which else might have to be reserved, is to insert a clause providing that they shall not come into effect unless brought into operation by proclamation, with the result that, if the Imperial Government dissents, no proclamation is issued. This happened as regards the Dominion *Copyright Act* of 1889, part XV on load-lines of the *Canada Shipping Act*, and c. 57 of the Acts of 1910 dealing with the control of cable rates, which was to be dependent on the passing of legislation by the Imperial Parliament to the same effect.

In the case of the Commonwealth the same rule of not laying down any detailed instructions was adopted, following the precedent of Canada since 1878, but, though the model of these two Dominions was applied to the case of New Zealand when that Dominion was formally given the style of Dominion of New Zealand in 1907, it was not adopted in 1909 on the creation of the Union of South Africa.<sup>2</sup> In the royal instructions in that case the Governor-General is forbidden to assent to any Bill which he has been specially instructed by the Secretary of State to reserve, and is directed to take special care not to assent to

<sup>1</sup> *Canada Sess. Pap.*, 1877, No. 13.

<sup>2</sup> *Commons Deb.*, ix. 1635 f. ; *Lords Deb.*, ii. 761, 863 f. ; 776 (Lord Curzon), 794 (Lord Lansdowne), 789 f. (Archbishop of Canterbury).

any Bill which under the Constitution he is required to reserve, and in particular he is directed not to assent to any Bill which disqualifies any person who is or may become under the laws existing in any province at the time of union capable of being registered as a voter in the Union on the ground of race or colour only. This clause is in accord with a definite promise given in the House of Commons when the Act of 1909 was being passed. On the other hand instructions are given in the case of the Australian States, of Newfoundland, Malta, and Southern Rhodesia, but naturally not in the case of the Irish Free State, while in Canada the Dominion Government does not deem it desirable to issue instructions.

The Newfoundland instructions of 1876, though much less detailed than the instructions of 4 May 1855,<sup>1</sup> are still rather antique in phraseology, though not in substance. They run :

XVII. Our said Governor is not to assent in Our name to any Bill of any of the classes hereinafter specified, that is to say :—

1. Any Bill for the divorce of persons joined together in Holy Matrimony.

2. Any Bill whereby any grant of land or money or other donation or gratuity may be made to himself.

3. Any Bill whereby any paper or other currency may be made a legal tender, except the coin of the realm or other gold or silver coin.

4. Any Bill imposing differential duties.

5. Any Bill the provisions of which shall appear inconsistent with obligations imposed upon Us by Treaty.

6. Any Bill interfering with the discipline or control of Our forces in Our said Colony by land and sea.

7. Any Bill of an extraordinary nature and importance, whereby Our prerogative, or the rights and property of Our subjects not residing in Our said Colony, or the trade and shipping of the United Kingdom and its Dependencies, may be prejudiced.

8. Any Bill containing provisions to which Our assent has been once refused, or which have been disallowed by Us :—

Unless such Bill shall contain a clause suspending the operation of such Bill until the signification in Our said Colony of Our pleasure thereupon, or unless Our said Governor shall have satisfied himself that an urgent necessity exists requiring that such Bill be brought into immediate operation, in which case he is authorized to assent

<sup>1</sup> Cf. the older Canadian instructions, *Sess. Pap.*, 1906, No. 18.

in Our name to such Bill unless the same shall be repugnant to the law of England, or inconsistent with any obligations imposed upon Us by Treaty. But he is to transmit to Us, by the earliest opportunity, the Bill so assented to with his reasons for assenting thereto.

In the case of the Australian States the same general list is given, but nos. 4 and 6 disappear, as the question of customs and of defence are removed from State control, and no. 3 refers merely to currency, for the States cannot normally sanction the issue of paper currency. Moreover the proviso is prefaced by the further clause, ' Unless he shall previously have obtained Our instructions upon such Bill through one of Our Principal Secretaries of State, or '. In the case of Southern Rhodesia there is omitted no. 6 regarding interference with the Imperial forces, presumably because such forces are not in fact stationed in the Colony, and there has disappeared the authority to assent in case of urgent necessity, doubtless by reason of telegraphic facilities, and the fact that the alternatives of receiving prior instructions from the Secretary of State, or of the insertion of a suspending clause, are quite adequate. In the Maltese instructions the prohibition against interfering with Imperial matters is wider, and applies to ' any law which appears to him to relate to or anyway affect any reserved matter within the meaning of the Malta Constitution Letters Patent, 1921 ', while no reference is made to currency, which is not within the powers of the Legislature. In this case also urgency is not a ground for assent.

Of the old letters patent, now superseded by Union, those of the Cape agreed with the Newfoundland list, while in the case of Natal was added a clause (8), ' any Bill whereby persons not of European race or descent may be subjected or made liable to any disabilities or restrictions to which persons not of European birth or descent are not also subjected or made liable '. Urgency was permitted as a ground for assent, the proviso following the form of that in the case of the Australian States. In the Transvaal and the Orange River Colony the clause <sup>1</sup> regarding withholding assent from Bills differentially affecting non-Europeans was strengthened by being inserted in the letters patent constituting the Legislature, thus rendering any Bill violating the prohibition utterly null and void, whereas under

<sup>1</sup> Letters Patent, 6 Dec. 1906, s. 49 ; 5 June 1907, s. 51.

the *Colonial Laws Validity Act*, 1865, insertion of prohibitions in the instructions does not invalidate the Bill if wrongly assented to by the Governor. The letters patent contained also instructions requiring the reservation of all Bills regarding the importation of indentured labour and the alteration of the Constitution. In the instructions were inserted the remaining prohibitions of the Natal model.

The right to give instructions against assenting to Bills is clearly inherent in the prerogative of the Crown to instruct its representative in any matter in which he has discretion, but it is further strengthened by specific reference in the Constitution Acts, which in some cases add to the number of subjects requiring reservations. In the case of Canada assent, withholding of assent, or reservation is made subject to 'Her Majesty's instructions', but no classes of Bills are required to be reserved. It is also recognized in the New Zealand Constitution of 1852 (s. 57), and by s. 65 one class of Bills requires reservation. In that of the Union of South Africa reservation is specifically required in a number of cases of constitutional change, and as regards any limitation of the right to appeal from the Appellate Division of the Supreme Court to the Crown in Council. It was recognized in the older Acts of 1842, 1850, and 1855 regarding the Australian colonies, and reinforced and defined in the Act of 1907, in which is laid down the rule as to reservation of Bills amending the constitutions of the States. In Malta the right to give instructions is clearly recognized, and in addition the Governor is required to reserve any Bill differentiating against non-Maltese subjects ; any Bill dealing with local government matters, or roads, and incidentally affecting Imperial property or interests or dealing with shipping and allied subjects ; and any Bill altering the letters patent or other Orders in Council applying to Malta, which is according to the Constitution open to variation by the Legislature. In Southern Rhodesia, in addition to provision for instructions, the Governor must reserve Bills differentially affecting natives save as regards arms, ammunition, and liquor ; any Bill amending the letters patent or constituting a Legislative Council ; any Bill as to mining revenues or railways pending the passing of legislation similar to that in force in the United Kingdom regarding the Railway and Canal Commissioners and the

Rates Tribunal under the *Railways Act*, 1921. The right to give instructions, of course, exists in Northern Ireland, and is imported into the case of the Irish Free State by the allusion to the Canadian practice, which is to govern the action as to assent, withholding assent, or reservation of Free State Bills. Instructions were also referred to in the constitutions of the Transvaal, Orange River Colony, Cape, and Natal, while, as we have seen, in the two former actual rules were laid down in the letters patent themselves requiring reservation.

There is a curious exception in the case of the Commonwealth. The provision in s. 58 is, 'When a proposed law passed by both Houses of Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to this Constitution, that he assents in the Queen's name, or that he withholds assent, or that he reserves the law for the Queen's pleasure'. On this has been based the argument that the Governor-General must use his discretion subject to the Constitution, which introduces responsible government, and thus indicates that he is to act on ministerial advice in the usual way. This is plainly wrong, and indeed renders the reference to discretion ludicrous. The words 'subject to this Constitution' have a perfectly plain meaning; they allude to the fact that under s. 74 of the Constitution proposed laws diminishing the right of appeal to the Privy Council must be reserved. The discretion left is not a personal discretion; it is that of the representative of the Crown, and it is clear that the only proper use of the discretion is to reserve Bills in accordance with the advice of the Ministry or of the Secretary of State.<sup>1</sup> Either course is perfectly proper; the Ministry are excellent judges of whether it is right that a Bill should receive the approval of the Imperial Government, and that Government has full authority to protect itself. In the one case of reservation, save as regards merchant shipping under the *Merchant Shipping Act*, 1894, that

<sup>1</sup> Contrast Todd, *Parl. Government in the Colonies* (ed. 2), p. 169. The decision of the Imperial Conference of 1926 (Part VIII, chap. iii, § 8) to deprive Governors-General of representation of British interests cannot operate without legislation in this regard, as the power to reserve is statutory, and is much more convenient than disallowance, which conceivably (e. g. in the case of a Secession Bill) might be necessary; in the Irish Free State only reservation is possible (Const. Art. 41). Mr. Baldwin in the Commons (25 Nov. 1926) stated that no change in this regard was contemplated.

of the Bill of 1906 regarding preference to British goods conveyed in ships manned by white seamen, where there were objections to the Bill ever being completed by assent, the Imperial Government and the Ministry concurred in regarding reservation as eminently proper.

It is a rule that any Bill reserved for the signification of the royal pleasure lapses, unless within a period normally of two years the Governor by speech or message to the Legislature or by proclamation announces that it has received the assent of the Crown in Council. The period is reduced to one year in the case of the Union of South Africa, Malta, Southern Rhodesia, and Northern Ireland, and also in the case of the Irish Free State, which in this case is not to be regulated by the Canadian usage, which is two years. In the case of the old colonial constitutions in South Africa the period was two years, save for Natal, where it was left undefined. In the constitutions of the Australian Colonies the period was two years, and it is so fixed under the Act of 1907, but it is dubious whether or not this limit applied to Bills reserved, not under the Act itself, but under royal instructions ; moreover, a Bill might be reserved under the Act needlessly when it might be reserved only under instructions, in which case two years would doubtless be the limit. The question, however, is clearly of no moment ; obviously to allow an enactment after two years would be absurd. The limit of one year has, of course, the disadvantage that, if it is necessary to pass amending legislation before the Bill can properly be assented to, the period left may be inconveniently short, while it is always objectionable to assent to a Bill on the faith of a governmental promise, which cannot fetter Parliament and which may on one plea or another be disregarded. In the Canadian Provinces also the period is a year, the assent being that of the Governor-General, who must act in Council ; one Bill of Prince Edward Island to abolish the liturgy of the established Church of England was assented to too late by inadvertence, so that re-enactment was necessary in 1879.

In Newfoundland there is no express power given to reserve Bills, and it may be dubious if the power exists. It is, of course, open to a Governor to hold over his expression of assent or otherwise pending consultation with the Imperial Government, which may be by telegraph, but that is quite different from the

assumption of a power to send a Bill home without expressing assent or dissent for the purpose of royal assent in England. In point of fact the practice in the Colony is to use suspending clauses as in the Acts (c. 4) of 1905 and (c. 1) of 1906 regarding foreign fishing-vessels, of which the former was allowed to come into operation by the Imperial Government, the latter not. It was noteworthy as it contained a reference to its coming into effect when ratified by the King in Council, possibly an allusion to the power of the Crown in Council to adopt a local Act as Imperial legislation under the authority of the Act of 1819 regarding the control of the fisheries of Newfoundland. It is clear that there is no limit of time to bringing into effect Acts containing suspending clauses, unless indeed the time is specified in these clauses; similarly in the Maritime Provinces of Canada before federation, when reservation was in use, assent could be signified without limit of date. It is interesting to note that the phraseology of the older royal instructions, whenever given, merely provides as a normal rule that the Governor shall not assent to certain classes of Bills, without specifying that he is to reserve the Bills in question, though by constitutional usage this is what he does. Express instructions to reserve any Bills which he is required by the Crown to reserve are given, however, in the Government of Ireland Act to the head of the Government of Northern Ireland.

Occasional instances of suspending clauses or reservation or confirmation by Order in Council are alluded to as necessary in other Imperial Acts in addition to Constitution Acts. Thus legislation regarding the coasting trade under s. 735 of the *Merchant Shipping Act*, 1894, must contain a suspending clause and must be confirmed by Order in Council as a condition of its validity, and legislation under s. 736 of the same Act requires a suspending clause. Under the *Colonial Courts of Admiralty Act*, 1890, Dominion legislation requires either a suspending clause, or reservation, or the previous sanction of the Admiralty. Reservation is naturally appropriate in the case of shipping Bills apart from the legal necessities under the Act of 1894, as they are measures necessarily falling under the provisions of the instructions regarding the reservation of Bills of importance affecting the trade and shipping of the United Kingdom, and this mode of procedure facilitates calm discus-



sion. Thus the New Zealand Shipping Bill of 1903 was only assented to in 1905 after agreement had been reached to refer the whole issue to a Navigation Conference in 1907. At this New Zealand agreed to alter her legislation, which was done by No. 38 of 1909, and this again was reserved, receiving the royal assent in 1911; another very drastic Bill was passed in 1910 and never assented to at all. The important Bills of the Commonwealth as to shipping are regularly reserved.<sup>1</sup>

Reservation under instructions can always be avoided by prior consultation, and under the Act of 1907 regarding the Australian States even in respect of reservation under the Act. It is freely employed in both classes of cases for all measures of secondary importance, such as the South Australia Constitution Bill of 1910.<sup>2</sup> In fact the sound use of reservation is rather in respect of individual Bills under express instructions than of classes of Bills. But in some States it is preferred to adhere to usage as regards reservation, e. g. in Victoria in respect of so small a matter as the admission of women to eligibility for either House.<sup>3</sup> Both in the case of Malta and of Southern Rhodesia the possibility of receiving instructions to assent to Bills required under the constitution to be reserved is present, and it would clearly be desirable if it were recited in each Bill thus assented to that the necessary assent had been received. It may, however, be assumed that the courts will not require proof of assent having duly been given, but will assume that in the absence of evidence to the contrary—which it would always be hard to prove true—the Governor only assented after obtaining the royal instructions.

Reservation is obviously so much superior to disallowance of completed legislation, which would always be extremely offensive and might create much difficulty after new arrangements had been made on the faith of legislation, that the later power is definitely obsolescent, though it is too much to say that it is obsolete. Indeed, every Dominion or State which desires to take advantage of the privilege of having its stocks included in the list of those in which trustees in the United Kingdom can invest, must put on formal record the view that any Act which

<sup>1</sup> Act No. 4 of 1913; No. 31 of 1919; No. 1 of 1921; No. 8 of 1925.

<sup>2</sup> So as regards the extension in 1916 of the duration of the Parliament of New South Wales. <sup>3</sup> Act No. 3337 (1923–4) amending the *Constitution Act*, No. 2632.

infringed the security on the faith of which investors lent their money to the Government would properly be disallowed, and the pressure of financial opinion is sufficiently strong to render it quite possible that a Bill so offending would be disallowed if the Governor did carelessly assent to it. But the probability of any Dominion thus breaking faith is negligible, and Queensland's experience in finding borrowing precluded until she modified her confiscatory land legislation is not such as to encourage further movements in this direction, unless indeed the electorate loses its head altogether. The Canadian Provinces are unable to have their stocks listed as trustee securities simply because the Imperial Government has not the power of disallowance, and will not accept the suggestion that the Dominion Government might give an assurance that it would disallow on the request of the Imperial Government.

The power of disallowance is given formally in the case of all the Dominions, States, and Colonies, save the Irish Free State and Northern Ireland, though on the model of Canada the former should be subject to the ordinary rule. In the latter case it is clear that the fact that the Legislature can be overridden by Imperial Act, and that its powers are purely local, renders disallowance needless. The time allowed is two years from the date of receipt of the Act by the Secretary of State in the case of Canada,<sup>1</sup> New Zealand,<sup>2</sup> the Australian States,<sup>3</sup> and, formerly, the Cape and Natal; in the case of the Commonwealth<sup>4</sup> and the Union,<sup>5</sup> Malta, and Southern Rhodesia the period of a year only dates from the time of assent, a reflex of the easier communications of the present day; the same point was taken for reckoning the two-year period adopted in the Transvaal and Orange River Colony constitutions. In Newfoundland the period is wholly undetermined, but the custom in the Maritime Provinces before federation, and in that of Newfoundland, is disallowance within two years of receipt; in all cases the form of disallowance is by Order in Council. Moreover, disallowance must be complete; even in the case of the Crown Colonies<sup>6</sup> partial disallowance, which may be possible,

<sup>1</sup> 30 Vict. c. 3, s. 56.

<sup>2</sup> 15 & 16 Vict. c. 72, s. 58.

<sup>3</sup> 5 & 6 Vict. c. 76.

<sup>4</sup> Const. s. 59.

<sup>5</sup> 9 Edw. VII. c. 9, s. 65.

<sup>6</sup> A limit of time thus exists in the Leeward Islands, 34 & 35 Vict. c. 107; in Jamaica, and a few other cases.

is clearly far from a desirable procedure, save possibly in the case of an easily separable and improperly inserted clause. If Acts are not disallowed, the old usage was formally by Order in Council to express the intention to leave Acts to their operation ; this has been superseded by mere intimation by dispatch, leaving it open to argument that such intimation might be overridden later by formal disallowance, but the question is otiose in view of the improbability of such a happening. In any case the step is needless, possibly rather offensive than otherwise, as was indicated at the Imperial Conference of 1926, though in the past the failure to intimate any view of Acts may have been taken as an intimation that the Crown did not wish to disallow, but was reluctant even in the most formal way to express any approval of them.<sup>1</sup>

### § 3. *Control over Legislation : Subjects of Control*

The instructions indicate clearly enough, when taken into conjunction with the clauses in Acts requiring reservation, or similar treatment, of constitutional changes, and shipping legislation, the nature of the matters which have been found suitable subjects for Imperial control. They may conveniently enough be divided into : (1) the prevention of grants to the Governor ; (2) questions affecting the prerogative and the Constitution ; (3) legislation affecting unfairly persons not in the Dominion ; (4) internal affairs ; (5) native affairs ; (6) the immigration and treatment of coloured races ; (7) treaty relations and foreign affairs ; (8) trade and currency ; (9) merchant shipping ; (10) copyright ; (11) divorce and status ; (12) naval and military defence ; (13) honours, which are included in the prerogative but merit special treatment ; (14) judicial matters, including appeal and the prerogative of pardon ; (15) ecclesiastical matters, again affecting the prerogative. Apart from mere control of Dominion legislation, there has been positive Imperial action in many directions, at one time independent of the Dominions, but latterly assuming the form of legislation enacted to secure the co-operation of Dominion legislation for the attainment of a common end. This indeed constitutes the

<sup>1</sup> e. g. Newfoundland Acts, 1895, cc. 7, 11, 12 ; Natal Act No. 27 of 1895 ; Western Australia Act No. 54 of 1899 ; *Parl. Pap.*, H. C. 184, 1906, p. 4.

whole history of the control exercised by the Imperial Government and Parliament over the Dominions ; commencing with a wide degree of supervision from a superior standpoint, sometimes with scant regard for colonial susceptibilities, it has gradually been transformed into co-operation on a footing which steadily approaches more closely to the ideal of a Commonwealth of equal nations. It is, however, right to point out that this ideal is not yet actual ; the process of attaining autonomy is yet incomplete, and indeed must be incomplete, until the Dominions have both the strength and the will to accept a real position of equality.

In the case of Malta and Northern Ireland the status of self-government is markedly limited by special considerations which require distinct treatment. Southern Rhodesia, though also limited in authority, differs fundamentally from these two cases in that the restrictions on her power are clearly in themselves transitory,<sup>1</sup> and not intended permanently to be retained. It does not seem probable, on the other hand, that any fundamental change can be brought about in regard either to Malta or to Northern Ireland.

#### § 4. *Bills affecting the Governor, the Prerogative, and the Constitution*

The solemn insertion of the prohibition to assent to a Bill for a grant to himself in the royal instructions suggests a reflection on the integrity of officers of the Crown, which is nowise deserved. It has its origin in days when Governors could manage subservient Legislatures, and possibly is justified in the constitutions of the Crown Colonies even now.<sup>2</sup> The only case of its importance in Colonies under responsible government dates back to 1867-8, when the Assembly of Victoria sought to reward the Governor who had fought with them, as they held, against the tyranny of the Council, and had for his pains been recalled by a harsh Government, to which the Council appeared to possess the majesty of the House of Lords. Much more to the point is the prohibition in the Act of 1907 regarding the

<sup>1</sup> That as regards railway rates in effect became minimal under the scheme agreed upon in 1926 by the Imperial Government ; *Railways Act*, 1926.

<sup>2</sup> It is adopted for Papua by the Commonwealth *Papua Act*, 1905.

Australian States of the passing of legislation affecting the salary of the Governor, without reservation or prior agreement. The constitutions of the Dominions normally stereotype by Act the Governor's salary, exempting it from annual discussion, and it is obvious that it could not be varied during the tenure of office without serious impropriety.

Acts affecting in any extraordinary degree the prerogative,<sup>1</sup> using that term in the sense of the executive power of the Crown exercised without statutory creation, are proper subjects for reservation. This has been carried so far as to lead in Tasmania to the reservation of Act No. 17 of 1907 because in providing for the treatment of indeterminate sentences it did not specially reserve the prerogative. It is, however, plain that the prerogative is not taken away by such a measure, unless it is worded so as to eliminate the idea of its continued existence ; in Victoria Act No. 2106 expressly saved the prerogative, and so Act No. 15 of 1910 in New Zealand, though no saving was included in Act No. 8 of 1906 or New South Wales Act No. 15 of 1905. Bills regulating the precedence of persons in the territory would require reservation if not passed by agreement, and still more Bills attempting to create colonial peerages, knighthoods, or orders. The privilege of conferring royal charters on bodies is one reserved to the Crown, and, therefore, in Canada the Dominion Government disallowed more than once Acts of Ontario which gave accountants the style of Chartered and, not content with this, proceeded to forbid Chartered Accountants in England to use that style in Ontario.<sup>2</sup> Similarly, as a matter of courtesy, the Dominions refuse to incorporate bodies with the style of Royal, unless the authority of the King has been obtained, as it was in 1910 for the incorporation of the Royal Guardians of Canada by 9 & 10 Edw. VII. c. 158, just as the royal sanction is always obtained, if Dominion forces desire to assume that style, or a designation such as 'Princess Patricia's' Battalion. Legislation regarding flags is another subject on

<sup>1</sup> This term is often used as equivalent to executive power (e. g. Barton, *Melbourne Federal Deb.*, pp. 2253 f. ; Quick and Garran, *Const. of Commonwealth*, p. 406 ; *Ontario Sess. Pap.*, 1888, No. 37). Elsewhere it is restricted to power not statutory ; it includes in any case more than executive power, for there is a legislative and judicial prerogative.

<sup>2</sup> See Acts 1908, c. 42 ; 1910, c. 79 ; 1911, c. 48. Cf. Newfoundland Act, 6 Edw. VII. c. 29.

which action should be taken only in accordance with Imperial agreement, which was accorded, reluctantly or not, in the case of New Zealand as well as of the Irish Free State, and, of course, in that of the Union of South Africa.

As regards judicial matters the prerogative to grant special leave to appeal cannot be successfully restricted save by Imperial Act, and it has been so limited for the Commonwealth and the Union alone. It was clearly intimated to Canada in 1875<sup>1</sup> that any attempt to take away the prerogative when creating the Supreme Court would result in the reservation and probable lapse of the Bill, which therefore was framed to save the right. When in 1889<sup>2</sup> the right in regard to criminal cases was taken away by Dominion statute, it was done with the consent of the Imperial Government, but the attempt was, as repeatedly pointed out by the writer and as now ruled by the Privy Council, invalid as contrary to the express terms of the *Judicial Committee Act*, 1844. The attempt of Victoria to increase to £1,000<sup>3</sup> the limit of appealable cases was not interfered with, but that was due to the fact that the Imperial Order in Council being made under the authority of the Act of 1844 was held to override the statute.

There are objections from the point of view of the Imperial Government to needless regulation of prerogative matters by statute. Thus the Natal Act conferring responsible government was amended by desire of the Government to refrain from creating the office of Governor, as being a matter of prerogative. But since 1910<sup>4</sup> various Acts providing for the authority of the deputies of the Governors have been allowed, as there was doubt whether deputies could exercise without statutory authority the statutory powers of the Governor in cases where deputies were appointed merely under the prerogative, and not as in the federations and the Union under statute. The Dominion of Canada in its dealings with the Provinces has shown similar

<sup>1</sup> 38 Vict. c. 11, s. 47 (*Rev. Stat.*, 1906, c. 139, s. 59) ; Norton, *Nineteenth Century*, July 1879, p. 173.

<sup>2</sup> See Criminal Code of Canada, s. 1025 ; *Nadan v. The King* (1926), 42 T. L. R. 356. I cannot conceive how the Privy Council took so long to recognize a fact so clear, once attention was called by me to it.

<sup>3</sup> *Supreme Court Act*, 1890.

<sup>4</sup> Contrast South Australia *Council Deb.*, 1906, Sess. 2, p. 141 ; *Ass. Deb.*, 1906, Sess. 1, p. 191 ; Keith, *Imperial Unity and the Dominions*, pp. 71-3.

reluctance to allow enactments on executive matters, but this view has now been dropped.

Important constitutional changes have seldom caused serious friction between Dominion and British Governments, partly because the system of two Houses has normally meant that any change desired has been one supported by a vast majority of responsible opinion in the territory. Nor has anything very effective been done for many years past to preserve the nominee Upper Houses, which are capable of being swamped, from suffering that fate. It is true that the decision in 1892 to instruct the Governor of New Zealand to assent to his ministers' request for the addition of twelve members to the Upper House cannot be called swamping, because it left the Government still in a real minority;<sup>1</sup> but it was recognized thereafter that the Upper Houses could be swamped, and nothing was done to prevent this fate attending the Upper House of Queensland. The Bill, it is true, was duly reserved by the Governor, but the Imperial Government declined to refuse it assent, despite petitions addressed to it.<sup>2</sup> It is true that between those who preferred one House only, and those who held that a House of the nominee type was really worthless, there existed a very real desire in the minds of the majority of the people of the State in favour of the disappearance of the Council. But it is difficult to apply the same view to the permission accorded to the Governor of New South Wales at the close of 1925<sup>3</sup> to add twenty-five members to the Council, seeing that the Labour Government enjoyed a majority of four at most in the Assembly, and there was certainly no unanimity or probably even majority in the State for violent action of this sort. Still more striking from the point of view of acceptance of local wishes was the extension agreed upon of the New South Wales Parliament for a year in 1916,<sup>4</sup> thus overriding the limitation to three years, despite the strong protest of the Labour party, which put the matter in quite a different position from the cases of New Zealand and Newfoundland where united Governments with no serious opposition applied for authority to prolong the lives of the Legisla-

<sup>1</sup> *Parl. Pap.*, H. C. 198, 1893-4.

<sup>2</sup> Keith, *War Government of the Dominions*, pp. 258-61.

<sup>3</sup> Keith, *J. C. L.* viii. 129 f.; ix. 126 f.

<sup>4</sup> Keith, *War Government of the Dominions*, pp. 271 ff.

tures in the war period. No difficulty was ever made in accepting the admission of women to the franchise even at the time when the idea was quite unthinkable in England. Nor was any exception taken to the rather remarkable *War Time Elections Act*, 1917, of Canada, with its wholesale enfranchisement of women connected with the troops and disfranchisement of persons of alien enemy connexions, though it was denounced by Sir W. Laurier<sup>1</sup> as a deliberate attempt to alter the electorate in order to secure a verdict for the Government. Not less tolerant was the view taken of the Queensland Act which, in order to secure the Labour Party a majority in a critical period, provided for proxy voting, though such an arrangement was really straining decency rather far even for Queensland. There is no doubt of the wisdom of these abstentions; it is for the people to decide on these issues for themselves, and Imperial intervention would only be justified, if they were to be deprived of the right of passing judgement by the vote from time to time. On this principle the *War Time Elections Act* of Canada undoubtedly might have been condemned out and out, but there is something to be said for the fact that it was passed by such substantial majorities in both houses as to render it clearly an expression of the will for the time being of the people of Canada.

Akin to intervention in constitutional changes is the refusal to allow Bills which are *ultra vires* to remain in operation, in cases where the invalidity of the whole Act is patent, and it would be dangerous to leave it in operation. Thus in 1862<sup>2</sup> an Act of Canada was disallowed because it purported to permit magistrates in Canada to deal with offences committed in New Brunswick, for which purpose it was naturally held by the Imperial Government that an Imperial Act would be requisite, or alternatively extradition agreements between the Provinces rendered effective by local Acts, a course followed by the South African Colonies in 1905. In 1869,<sup>3</sup> however, it was thought sufficient to point out that a Dominion Act was *ultra vires* as purporting to penalize Acts done on the high seas, with the result that the error was undone by an amending Act of

<sup>1</sup> Skelton, *Sir Wilfrid Laurier*, ii. 528 ff.

<sup>2</sup> Canada *Leg. Ass. Journals*, 1862, p. 101.

<sup>3</sup> *Sess. Pap.*, 1870, No. 39.



1870 (c. 26). In 1873<sup>1</sup> an invalid Act caused much trouble in Canada; it purported to confer on committees of the Senate and House of Commons power to examine witnesses on oath, which was beyond the powers of the Dominion in view of the limitation of its authority to taking privileges not greater than those of the Commons of the United Kingdom. The power of disallowance had to be exercised, but an Imperial Act of 1875 (c. 38) accorded the necessary authority, acted on in 1876 (c. 7), and validated an Act of 1868 (c. 24), which conferred on the Senate the same privileges also invalidly, though this was overlooked at the time. The Canadian Bill of 1872<sup>2</sup> as to copyright was never allowed because of repugnancy to Imperial legislation, and the same fate awaited that of 1889,<sup>3</sup> though one of 1875<sup>4</sup> was validated by Imperial legislation. In a large number of Australian cases Acts regarding the Constitution, having been passed inadvertently with lack of form, have not been disallowed but have been validated *ex post facto*.<sup>5</sup>

### § 5. *Bills affecting non-residents*

As early as 1874<sup>6</sup> the Imperial Government emphatically disclaimed the intention of intervening to protect the interests of non-residents in matters under the control of the Government of Canada. The occasion was a Bill to regulate the construction and maintenance of marine electric telegraphs, and it was urged that it would operate unfairly to the Anglo-American Company which appeared to oppose it in the Senate. The Bill was reserved under the instructions then in force as perhaps affecting the interests of non-residents, but an early assent was asked for. This was not accorded, but in lieu the Secretary of State declined to take any responsibility, observing that 'if the intervention of Her Majesty's Government were liable to be invoked whenever Canadian legislation on local questions

<sup>1</sup> *Commons Journals*, 23 Oct. 1873; *Sess. Pap.*, 1876, No. 45; Imperial Act, 38 & 39 Vict. c. 38.

<sup>2</sup> *Prov. Leg.*, 1867-95, pp. 11-13.

<sup>3</sup> *Ibid.*, pp. 30 ff.

<sup>4</sup> 38 Vict. c. 88; Imperial Act, 38 & 39 Vict. c. 53.

<sup>5</sup> The Canadian *Northern Pacific Halibut Fisheries Act*, 1923, was amended in 1924 (c. 4) to omit all reference to foreign vessels, not being vessels of the United States.

<sup>6</sup> *Canada Sess. Pap.*, 1875, No. 20.

affects or is alleged to affect the property of absent persons, the measure of self-government conceded to the Dominion might be reduced within very narrow limits'. The Bill, accordingly, was re-enacted with some changes, and became law in 1875. The same principle was reasserted by Mr. Chamberlain on 5 December 1898<sup>1</sup> in respect of Newfoundland railway legislation, and in 1908<sup>2</sup> it once more became of interest, because the Parliament of New South Wales had to legislate to defeat certain claimants, whose land claims derived from fraudulent transactions of a former Minister of Lands were intended to be included in the scope of an Act of 1906 by which it was proposed to settle the matter in the interest of the State. It was claimed that this Act was an unjust interference with legal rights of absent holders of land, but petitions to the Governor and the Imperial Government alike for refusal of assent or disallowance were rejected. The same thing happened in 1910<sup>3</sup> when the Commonwealth by Acts Nos. 21 and 22 proceeded to imitate the New Zealand rule of increasing land taxation on absent owners, in order to facilitate the breaking up of large estates. So, too, in spite of representations on the part of aggrieved persons, no steps were taken to disallow Act No. 28 of 1909 of the Transvaal which imposed a tax on the shares of companies engaged in mining in the Transvaal on their transmission on death, although such companies were registered and had their head-quarters in London, and though the deceased had no connexion of any kind with the Transvaal.<sup>4</sup> This remarkable impost was made effective by imposing the duty of payment on the company itself, if the representative of the deceased did not pay, with the result that the company reimbursed itself at the expense of the deceased by refusing to allow a transfer to be registered unless the demand were paid. On the other hand, a Tasmanian Bill of 1908 which imposed certain rather unfair obligations on foreign companies, i. e. those not registered in the island, was never assented to after reservation, because it was held to

<sup>1</sup> *Parl. Pap.*, C. 8867.

<sup>2</sup> See *The Times*, 27 June, 3 July 1908; Act No. 42 of 1906; No. 4 of 1908.

<sup>3</sup> A request that the Governor-General be instructed to reserve was declined, and petitions for disallowance rejected. The legality of the Acts was established in *Osborne v. The Commonwealth*, 12 C. L. R. 322.

<sup>4</sup> *Parl. Pap.*, Cd. 5135, pp. 105 ff.; Cd. 5746-1, pp. 267-9.

affect such companies unfairly, and the State Government, which had not fathered the Bill, which was introduced by a private member, did not care to press for assent ; on the other hand a Bill of 1896<sup>1</sup> allowing special advantages to local creditors of such companies had, after a correspondence with the local Government, received sanction.

On the faith of these precedents of the unwillingness of the Imperial Government to protect the rights of absentees, the Queensland Parliament in 1920<sup>2</sup> passed, after the Council had been swamped for the purpose by the addition of new members by the Lieutenant-Governor, who was an ex-Labour minister and should never have been appointed to the position of representative of the Crown, two confiscatory measures. The first repealed the assurance given in 1905 and 1910 to tenants of the Crown that on periodic reappraisement by the Land Court of the rents of pastoral leases and grazing selections the increase made should not exceed fifty per cent. On the strength of these provisions much money had been advanced by British lenders to pastoralists, who now found their security grievously impaired. The second Act provided that the Government should be entitled to take over the undertaking of the Brisbane Tramway Company, a British company, paying in debentures in lieu of cash and appropriating any part of the system which had been created without formal authority, however necessary it might have been, or however much its existence had been accepted by the Government. Efforts were made by the companies interested in the pastoral leases and by the tramway company, as well as by local holders, to induce Lord Milner to disallow the Acts, but the Secretary of State, essentially a weak man when left to his own devices, could not be expected to take this drastic step. The influence, however, of those interested ruined the effort of Mr. Theodore to secure a loan in London, and after attacking the Queensland deputation headed by Sir R. Philp, an ex-Premier, for their share in this result, he appealed to the electorate on the strength of the injury the disputants had done the State, but with very moderate success.

<sup>1</sup> Clark, *Austr. Const. Law*, pp. 321 ff. ; 59 Vict. No. 17.

<sup>2</sup> Keith, *War Government of the Dominions*, pp. 258 ff. It may be assumed that no derogation as regards loans is contemplated even by the Imperial Conference of 1926 ; see Part VIII, chap. iii, § 8.

Later the necessity of again approaching the English market resulted in substantial concessions being made to both pastoralists and the Brisbane Tramway Company, after which the London market was again made available to Queensland. The episode was of special value as emphasizing the power of the world of finance to protect itself against spoliation. To borrow money in the United States was only possible on terms ruinously expensive to the State, and once the idea of confiscatory legislation was raised, it was clear that investors would fight shy of Queensland. The question indeed was raised whether the Imperial Government would in its altered attitude towards confiscatory legislation be willing even to disallow an Act impairing the security of Queensland Government loans, and it is not easy to feel complete assurance even on this head. A suggestion by the writer that in such cases as those of alleged confiscatory legislation arbitration should be resorted to by Dominion Governments on the proposal of the Imperial Government—and of course with similar procedure in claims by Dominion residents against the British Government—received no acceptance from the Premier of Queensland, nor was it taken up by Lord Milner. Nevertheless, it is clear that if difficulties should arise as to the interpretation of agreements between the Governments, as they did arise in cases of contracts during the war, when the Queensland Government was far from generous, or even just, in its claims on the Imperial Government,<sup>1</sup> or under the immigration scheme of 1925,<sup>2</sup> it would appear inevitable that arbitration should be resorted to, unless the Imperial Government should think fit to sue the Commonwealth or the State in the High Court, as doubtless it could do under the Commonwealth Constitution.

In the case of Dominion loans admitted to rank as trustee securities, the conditions requisite for admission include an undertaking to maintain sufficient funds in London to meet any sums ordered to be paid by a Court of competent jurisdiction, and an expression of opinion that Acts impairing the

<sup>1</sup> The State appears to have endeavoured to profiteer shamelessly and to have put forward claims of a flagrantly dishonest kind. There was far too much of this taking advantage of British good nature during the war, as also in the case of Canadian purchases for the Imperial Government.

<sup>2</sup> See *Parl. Pap.*, Cmd. 2640.

security would be properly disallowed. This condition has been imposed on the Canadian Dominion as well as the Commonwealth<sup>1</sup> and the Union of South Africa.

<sup>1</sup> *Parl. Pap.*, H. L. 189, 1877 ; C. 6278 ; H. L. 169, 1892 ; H. C. 276, 1893 ; H. C. 300, 1900 ; *Canada Sess. Pap.* 1900, No. 139. The provinces of Canada cannot have their securities made trustee, as their Acts cannot be disallowed by the Imperial Government, and that Government will not accept any promise of Dominion disallowance. It must be assumed that the power to disallow is not affected by the Imperial Conference of 1926.

## II

### IMPERIAL CONTROL OVER THE INTERNAL AFFAIRS OF THE DOMINIONS

#### § 1. *The Control of Crown Lands*

LORD DURHAM in his report on Canada contemplated that the Imperial Government would retain control of the public lands and inaugurate a systematic scheme of immigration ;<sup>1</sup> but his advice was disregarded, and in 1840 (c. 35) and 1847 (c. 71) the legislation of the Imperial Parliament was directed towards giving the United Province the fullest power to deal with the public lands, including the lands originally reserved for the Church. The same generosity was shown to the Maritime Provinces when they received responsible government ; they were asked to provide by Acts civil lists, as had been done by the Imperial Act of 1840 for Canada, but subject to that the Crown was pleased to divest itself of its land rights in their favour. If two Nova Scotia Bills of 1847 did not become law, Acts of 1848 and 1849 (cc. 21 and 1) were more fortunate, and Prince Edward Island in 1851 (c. 3) was allowed to obtain the somewhat empty pleasure of control of the lands in return for a civil list. In 1852 (c. 39) it was realized that these grants were strictly speaking *ultra vires*, for by the Civil Lists Acts of William IV and Victoria<sup>2</sup> these Colonial land revenues ought to have been paid into the Imperial Exchequer to the credit of the Consolidated Fund. But this error was made innocuous by a formal surrender confirming in general terms what had been done. Yet Prince Edward Island got little out of its new authority. It passed in 1851 an Act (No. 814)<sup>3</sup> to fix in currency rents which in sterling were too burdensome, especially as they were paid to absentee landowners, who had received grants from the Crown directly or indirectly without valuable consideration of any kind. This was promptly disallowed. The

<sup>1</sup> *Report*, ii. 13 ; cf. Wakefield, *Art of Colonization*, p. 313.

<sup>2</sup> 1 Will. IV. c. 25 ; 1 & 2 Vict. c. 2. For New Brunswick, see 8 Will. IV. c. 1 ; Hannay, ii. 1 ff. ; 3 Cart., 20 ff.

<sup>3</sup> *Parl. Pap.*, H. C. 529, 1864, p. 41.

same fate met Acts (Nos. 913 and 915) of 1855, the first to impose a rate, nominally for the protection of the island on the withdrawal of Imperial troops, on the proprietors, the second to compensate tenants for improvements ; Sir George Grey<sup>1</sup> sententiously reminded the Legislature

that, although responsible government has been established in that island, responsible government exists also in Great Britain ; and Her Majesty's Government cannot take upon themselves the responsibility of advising the Crown to give its assent to Colonial Acts which are at variance with the principles of justice, and invade those rights of property which are the foundation of social organization.

In 1858, by Act No. 997, the Legislature sought to resume nominally to the Crown, really to give to the tenants, the fishery reserves, strips of the coast which had been long in the ownership of the absentee proprietors ; but Sir E. Lytton<sup>2</sup> would not allow the Act to stand, and urged the islanders to seek an accommodation. A commission was appointed, but the two Acts (Nos. 1105 and 1106) of 1861 which resulted were still regarded by the Imperial Government as mere cloaks for spoliation. A Tenants Compensation Bill, passed as 34 Vict. c. 9, in 1871, was rejected, but on re-enactment in 1872 and later modified with amendments suggested by the Imperial Government, it was allowed to become law,<sup>3</sup> and on federation Canada supplied the funds to clear out the burdensome and undeserving proprietors, who at the present day would have received short shrift.

British Columbia also received control of her own lands, though a considerable area was alienated by her for purposes of providing subsidies for railway construction, and the Imperial Act of 1868 opened up to Canada the vast lands of the Hudson's Bay Company. It is interesting to note that the Dominion adopted the policy of Lord Durham and maintained control of the public lands, despite the creation of Manitoba in 1870, and of Saskatchewan and Alberta in 1905.<sup>4</sup> The swamp lands which were returned to Manitoba in 1885 were resumed when

<sup>1</sup> *Parl. Pap.*, H.C. 529, 1864, p. 42.

<sup>2</sup> *Ibid.*, p. 43.

<sup>3</sup> 34 Vict. c. 9 ; 35 & 36 Vict. c. 60 ; 36 Vict. c. 24 ; *Parl. Pap.*, C. 1351, pp. 1-38 ; C. 1487, 2795 ; *Prov. Leg.*, 1867-95, pp. 1151, 1164.

<sup>4</sup> 48 & 49 Vict. c. 50 ; Manitoba Act, 49 Vict. c. 38 ; *A.-G. for Manitoba v. A.-G. for Canada*, [1904] A. C. 799.

her boundaries were extended in 1912, and despite energetic efforts on the part of the provinces, agreement to give Alberta her lands was reached only in 1926, nor did it even then become law.

Newfoundland was granted full control of her lands with responsible government in 1855, and in New Zealand, after the effort to settle the territory through the aid of the New Zealand Company, power was given in 1852<sup>1</sup> to deal with the Crown lands, subject to the existing rights of the Company. In 1856 it was decided to refuse assent to a measure to confer on the provinces the power of regulating the disposal of the waste lands of the Crown, as the matter was held proper for the central Legislature. In Australia<sup>2</sup> the grant of responsible government was accompanied by the grant by a special Act of power to the Colonies to regulate the management of waste lands, though the authority as regards Western Australia was retained in Imperial hands until responsible government was conceded in 1890. In this case an energetic fight was made for the retention of the control of the lands in Imperial hands, but the Governor pointed out that it was in fact impracticable to work any such policy, and this argument was accepted by the Parliamentary Committee which examined the question. The Cape received control of lands with representative government in 1853, Natal in 1856, and this power, of course, was continued under the new status of responsible government in 1872 and 1893, though in Natal native lands were placed by letters patent under a trust which was made statutory just before union. In the case of the Transvaal and the Orange River Colony it was felt proper to seek to make some provision to aid the unfortunate settlers, who had been introduced under Lord Milner's foolish and futile scheme for converting the racial character of the Colonies, by establishing Land Settlement Boards to last for five years with vague powers to advance the settlers. These needless bodies have naturally long since ceased to function. In Rhodesia the removal of the burden of the land claims of the British South Africa Company was accomplished before responsible government by the decision of the Privy

<sup>1</sup> 15 & 16 Vict. c. 72, ss. 72-8; s. 73 on native rights was repealed (under 25 & 26 Vict. c. 48) by the *Native Land Act*, 1873, s. 4.

<sup>2</sup> 18 & 19 Vict. c. 56.



Council<sup>1</sup> that the lands were the property of the Crown, and the generosity of the Imperial Parliament in providing funds to buy off the company's claims under that judgement for administrative deficits. All that remains is the provision of reservation in the letters patent respecting legislation affecting the mining rights of the company, which secures the Imperial Government the right to decide on what terms these can be expropriated by the Legislature. Under the Company's régime the position was safeguarded by the rule that the consent of the Administrator was requisite for the consideration of any matter affecting the Company's rights as proprietor. The Irish Free State received full legislative authority regarding the lands of the territory, and complaints have been freely made—probably without much justification—that the land legislation works great injustice to owners by reason of the much worse terms offered to those whose land is compulsorily taken for land settlement. Efforts, however, to induce representations by the Imperial Government naturally failed in 1925 to elicit any response.<sup>2</sup> Malta normally is without power to interfere with lands required for Imperial purposes, and in Northern Ireland the Imperial Acts are the dominating feature of the situation.

The complaint has often been made that Lord Durham's advice was neglected; Disraeli<sup>3</sup> held that responsible government should have been accompanied by suitable arrangements to retain control of the land. It is clear that to give the lands to small communities was rather an encouragement to enjoy the possession without incentive to plan immigration, which might increase competition. Canada, in her immigration policy, has often encouraged not only American immigration, despite its political dangers, but also the immigration of such bodies as the Doukhobors and Mennonites, who can be regarded as suitable settlers only by a somewhat severe stretch of imagination; the large blocks of foreign speech found in Canada are not an advertisement of effective settlement of the best stocks. Such aliens made moderate citizens, defying in many cases efforts to teach them English, though *prima facie* an immigrant who wishes to preserve his own speech, and not to learn English, is undesirable.

<sup>1</sup> *In re Southern Rhodesia*, [1919] A. C. 211.

<sup>2</sup> Cf. House of Lords Paper 134 (1926); *Deb.*, 11 May 1927.

<sup>3</sup> 24 June 1872; Buckle, *Life of Disraeli*, v. 194 f.

Similarly the long indifference or opposition of Australian opinion<sup>1</sup> to immigration, which persists to-day in Labour circles, as was shown at the Conference of Labour Parties of the Empire in 1925, can be explained as due to the selfish desire to enjoy as much profit as possible from the possession of great natural resources, while relying on the British fleet to secure uninterrupted possession by a small population to the exclusion of the overcrowded people of Japan and India. Nor is it unimportant that New Zealand in 1926 was unable to do anything to co-operate with the Imperial Government in its scheme of promoting settlement, or that for years the funds provided by the Imperial Government to effect this end on the basis of equal expenditure with the Dominions could not be spent for lack of Dominion support.

But the fact remains that it was out of the question to reserve the lands and to grant responsible government at the same time. The lands provided the most obvious source of revenue for the new Colonies, and, if withheld, there would have been need of Imperial subsidies, which assuredly negate responsible government. Moreover, legislation touches land at every turn, and to deny to the Legislatures the right to legislate so as to affect land would have been incompatible with responsible government, while, if the right was used, the Imperial Government would have been under the control of the local administration in its land policy. The whole issue was considered with anxious care in 1889-90<sup>2</sup> in connexion with Western Australia, and the evidence adduced is convincing against the possibility of any of the schemes suggested for Imperial action. The analogy of the provinces of Canada is illusory. Apart from the constant struggle on the part of the provinces to secure authority from the Dominion, the Dominion is a most powerful national government present in the provincial area and able to exercise its power, while the Imperial Government was far away, and *ex hypothesi* would have been interested in settlement only.

<sup>1</sup> Compare the fiasco of the operations as regards the Commonwealth of the British Government's emigration proposals of 1921-6. Doubtless the British control has been incompetent, but that is a minor matter.

<sup>2</sup> *Parl. Pap.*, C. 5743, 5752, 5919, 5919 I. See also Grey, *Colonial Policy of Lord John Russell's Administration*, and Adderley, *Colonial Policy*; Battye, *Western Australia*, pp. 392 ff.

§ 2. *Control in other Local Matters*

Before the grant of responsible government the Imperial control over the colonial Legislatures had been close and unremitting, and it is not surprising that traces of it remained during the early years of the operation of the system. Thus in 1843<sup>1</sup> a Bill as to secret societies passed in the United Province of Canada was reserved by the Governor-General, despite the protests of his ministers, who resigned in consequence, and was never allowed by the Imperial Government. In 1846<sup>2</sup> the stronger step was taken of disapproving a Bill which allowed the attachment of an officer's salary, on the score that the principle was not in force in the United Kingdom, and the Act to incorporate Bytown was disallowed in 1849,<sup>3</sup> though a different measure, less open to objection, was sanctioned in the same year. In the case of Prince Edward Island an Act to incorporate the Roman Catholic Bishop of Charlottetown was disallowed in 1861, but another measure was approved in 1862 (c. 16).<sup>4</sup> Newfoundland was a special object of disapproval in its early days; in 1858<sup>5</sup> an Act to provide for the liquidation of the cost of paving St. John's was disallowed, and in 1859 one to secure the payment of owners' assessments to water rates; in 1890 another Act regarding the municipality of St. John's was disallowed; a batch of Acts of 1895 (cc. 7, 11 and 12) dealing with loan transactions, warehouse receipts, and elections, were not formally allowed to remain in operation as a mark of disapproval of their terms, though disallowance was not resorted to, but in the case of an Act (c. 28) of 1897 assent was withheld, as it was deemed to be nothing less than a means of abusing the public finances for the benefit of one political party.

Newfoundland also was the scene of a most important series of transactions commencing in 1895<sup>6</sup> which laid down clearly the relations of the Imperial Government to responsible government in the Colonies in money matters. The question had always been treated by the Imperial Government as free from doubt; the suggestion that, because Colonial Acts were assented to by the Governor, the Imperial Government must be held to

<sup>1</sup> *Parl. Pap.*, H. C. 529, 1864, p. 27.

<sup>2</sup> *Leg. Ass. Journals*, 1846, p. 3.

<sup>3</sup> *Ibid.*, 1850, p. 7.

<sup>4</sup> *Parl. Pap.*, H. C. 196, 1894, p. 7.

<sup>5</sup> *Ibid.*, p. 8.

<sup>6</sup> *Parl. Pap.*, C. 8867.

be responsible for the financial transactions of the Colonies being repudiated with energy.<sup>1</sup> In 1895 the Newfoundland Government, owing to the distress caused by the failure of the Commercial Bank, asked the Imperial Government to guarantee the sum of £20,000 for twenty-five years as interest on bonds which it was proposed to issue, but the proposal was refused on the sound ground that the Imperial Government must leave it to the Colony to find its own finance. On the other hand, an offer was made to send out a Commissioner to inquire into and relieve distress. The Government asked again for a loan to enable the savings bank to meet deposits, but this also was declined in principle, though Sir H. Murray was dispatched as Commissioner and £20,000 placed at his disposal.<sup>2</sup> Sir H. Murray was later appointed Governor, and on 22 and 28 February 1898 he reported the details of an arrangement entered into by the Government and presented for his signature, under which in the view of Mr. Chamberlain 'all the Crown lands of any value become, with full rights to all minerals, the freehold property of a single individual, the whole of the railways are transferred to him, the telegraphs, the postal service, and the local sea communications as well as the property in the dock at St. John's', such an abdication by a Government of some of its most important functions being in his opinion without parallel. The contract was also protested against by the Anglo-American Company as an interference with its exclusive rights under Act No. 2 of 1854 to build and work telegraph lines, and to land cables, while the Opposition asked that the Governor should be forbidden to assent to the Bill to approve the contract, which the Government hurried through the Legislature. Mr. Chamberlain, however, in a telegram of 2 March<sup>3</sup> and a dispatch of 23 March<sup>4</sup> made clear that the constitutional responsibility in the matter rested entirely with Ministers, subject to due provision being made—as was done by a second Act—to safeguard the rights of the Anglo-American Company. The Government then sought to obtain the appointment of a Royal Commission, as had been suggested in 1890-1, to consider financial aid to the Colony; but this was declined,

<sup>1</sup> New Zealand *Parl. Pap.*, 1873-4, A. 2, No. 25; *Colonial Stock Act*, 1877.

<sup>2</sup> *Parl. Pap.*, H. C. 104, 1895; C. 7686.

<sup>3</sup> *Parl. Pap.*, C. 8867, p. 3.

<sup>4</sup> *Ibid.*, pp. 23 f.

Mr. Chamberlain pointing out that the situation had been entirely changed by the alienation of the railway and the vast bulk of the lands of the Colony without consulting the Imperial Government, which was firm in its refusal to afford pecuniary aid to a self-governing Colony. The opposition to the contract, however, declined to acquiesce in the position, and a large public meeting at St. John's on 4 October 1898 petitioned for the disallowance of the Act, or its being held over until it had been the subject of a general election. It was also pointed out that the measure had never been an issue at an election, and had been hastily rushed through the Legislature, and one unfortunate fact came to light. The Governor found that the Minister most energetic in securing the pushing of the Bill through the Legislature was the paid legal adviser of Mr. Reid, and he very properly required his resignation and withdrawal from all public offices, save that of Queen's Counsel, which step was taken by the Minister on the ground that he did not care to remain in the Executive Council if his presence were distasteful to the Governor.<sup>1</sup> Mr. Chamberlain's reply of 5 December 1898<sup>2</sup> is the more noteworthy because it was admittedly sent without waiting for the observations of Ministers, as the matter involved was one of principle. He pointed out that, if the Bill had been passed without due consultation of the electors, that was a matter on which the electors would have the constitutional right to pass judgement in due course, and, while the Upper House might have held that a ground for rejecting the Bill, it was no ground for Imperial disallowance. Further, if it was the case that the petition for disallowance emanated from more than half the registered electors, it might be a matter for the Governor to consider whether he should refuse to assent, but he would be taking a serious step in the case of a measure of local concern,

and if he failed to find other Ministers prepared to assume responsibility for his action, and able to secure the support of the Legislature, his position would become intolerable. Any such step on the part of a Governor would have to be taken entirely on his own motion. It is essential that for every act of the Governor in local matters full

<sup>1</sup> *Parl. Pap.*, C. 9137.

<sup>2</sup> *Ibid.*, pp. 26 ff. Adopted in 1921 by the Queensland Government, Cmd. 1629, pp. 56 f.

responsibility should attach to a Ministry amenable to the Colonial Legislature.

In regard to disallowance there were insuperable reasons against Imperial intervention. The Act was declared by the Finance Minister essential for financial solvency ; if disallowed, the Imperial Government would necessarily come under the obligation of securing such solvency by its intervention, an impossible position. If the machinery of government proved imperfect, it did not lie with the Imperial Government to remedy its defects, or to intervene between the people and their representatives, who had passed the Act by 31 to 5 in the Lower, and unanimously in the Upper House. The point that the alienation of the assets of the Colony was diminishing the assets, on the faith of which the creditors of the Colonial Government had advanced funds, was met by the observation that the loans were advanced on the general credit of the Colony, not on the specific assets, which were indeed mainly potential, and in any case the borrowers must look to the Colonial Government.

No doubt if it was seriously alleged that the Act involved a breach of faith or the confiscation of the rights of absent persons, Her Majesty's Government would have to examine it carefully, and consider whether the discredit which such action on the part of a Colony would entail on the rest of the Empire rendered it necessary for them to intervene,

but no such charge was made. Further, the principle was laid down :

The right to complete and unfettered control over financial arrangements is essential to self-government, and has been invariably acknowledged and respected by Her Majesty's Government, and jealously guarded by the Colonies. The Colonial Government and Legislature are solely responsible for the management of its finances to the people of the Colony, and, unless Imperial interests of grave importance were imperilled, the intervention of Her Majesty's Government in such matters would be an unwarrantable intrusion and a breach of the charter of the Colony.

In other parts of the Empire no such spectacular cases have occurred. In 1862 <sup>1</sup> a reserved Victorian Bill to grant a preferential lien on growing crops without delivery was not assented

<sup>1</sup> *Parl. Pap.*, H. C. 196, 1894, pp. 8 f.

to, on the score that the legislation was too advanced, but in 1876 a similar Bill became law. In Tasmania an attempt in 1859 to withdraw State aid from religion was refused approval, but it was allowed, as Act No. 30, in 1868. In Queensland an attempt to deal in 1879 with the arrest of criminals who had come from other Colonies was not approved, but in lieu the *Fugitive Offenders Act*, 1881, of the Imperial Parliament was made to include a part (ii) which made suitable provision for cases of contiguous colonies, such as those of Australia to which the part was duly applied.<sup>1</sup> In New Zealand a Bill to deal with railways was disapproved in 1861, and in 1863 permission to the provincial Legislatures to acquire land compulsorily. In Western Australia an Act (No. 39) of 1900 regarding patents was not allowed to come into operation, because, federation being about to become operative, it was held that it would not be just to allow local legislation to usurp the field even for a time, as hindering uniformity.<sup>2</sup>

<sup>1</sup> *Parl. Pap.*, H. C. 196, 1894, p. 9.

<sup>2</sup> *Ibid.*, H. C. 184, 1906, p. 5. Conditions to safeguard the rights of the British South Africa Company and its subsidiaries as to railways in Southern Rhodesia were inserted in the letters patent of 1923, but the matter was simplified by an agreement of 1926 involving co-operation between the Colony and the neighbouring territories; see *Ass. Deb.*, 18, 23 Nov., 17 Dec. 1926.

### III

## THE TREATMENT OF NATIVE RACES

### § 1. *Reservation of Bills*

IT is curious but historically possible of explanation that the royal instructions have contained few references to the reservation of Bills affecting native races. In Canada the Imperial Government retained control over Indian affairs for some time after responsible government,<sup>1</sup> and, when it transferred responsibility, it did not feel any necessity of seeking to retain any control. In Australia the aborigines ceased early to be of importance in the greater part of the area, and up to 1890 in Western Australia the Government was under Imperial control. The case was other in New Zealand, but the representation of the Maoris in the Legislature rendered it undesirable to include provisions for the reservation of Bills affecting them, having regard to the system of protection of their land interests under the constitution. Newfoundland had too few natives under its control to render special provision appropriate. In Natal, however, on the grant of responsible government it was provided that the Governor as Supreme Chief should be given an independent position, while all Bills of the Parliament differentially affecting natives were to be reserved, and this requirement was included in the Transvaal and Orange River Colony letters patent of 6 December 1906 and 5 June 1907 respectively. In these two cases a further provision was made; the Governor was given all the powers exercisable as Paramount Chief over the chiefs and the natives; the Governor in Council, on the other hand, was authorized to summon an assembly of native chiefs, and, if thought fit, other persons experienced in native affairs, to discuss questions as to the administration of native affairs, the Governor in Council being required to consider the representations made by any such assembly. Any land set apart for natives was not to be liable to be alienated save under a law. These provisions became

<sup>1</sup> *Parl. Pap.*, H. C. 247, 1856; H. C. 575, 1860. See also *Sess. Pap.*, 1877, No. 11.



inoperative on the advent of the Union, in which the Governor-General in Council was given by s. 147 wide powers. Under it the control and administration of native affairs, and of matters specially or differentially affecting Asiatics throughout the Union, are vested in the Governor-General in Council, who shall exercise all special powers in regard to native administration hitherto vested in the Governors of the Colonies<sup>1</sup> or exercised by them as Supreme Chiefs, and any lands vested in the Governor or Governor and Executive Council of any Colony for the purpose of reserves for native locations are vested in the Governor-General in Council, who shall exercise all special powers in relation to such reserves as may have been exercisable by the Governor or Governor in Council. No lands set aside for the occupation of natives which could not at the establishment of Union be alienated except by Act of the Legislature may be alienated, or in any way diverted from the purposes for which they are set apart, except under the authority of an Act of Parliament. No provision, however, is made for the reservation of such Acts, or to replace in any way the loss of independent power on the part of the Governors. But, as has been seen, the native franchise in the Union, that is in effect in the Cape, is safeguarded by the provision that it cannot be varied save by a vote of two-thirds of the total numbers of both Houses sitting together on the third reading of the Bill; such a Bill in any case cannot disfranchise an existing voter, and must be reserved for the signification of the royal pleasure, which may not be in favour of the change, for the Government of 1909 in passing the Bill through Parliament expressly safeguarded itself from any expectation of automatic assent to any disfranchising Bill of the kind.

In the case of Southern Rhodesia, on the other hand, the abnegation of ministerial responsibility is distinct, though it is intended that, so far as may be practicable, the system shall be worked by and through Ministers. It is not merely that the letters patent themselves contain a provision requiring that

<sup>1</sup> For the exercise of the power of removal of a dissident minority of a Baralong tribe under Law No. 4 of 1885 of the South African Republic, see *Mokhatle v. Minister of Native Affairs* (1925), *L. Q. R.* xlii. 154 ff. Transvaal Ordinance 1921, No. 7, imposing a poll-tax, was held void as an invasion of Union authority (p. 719, n. 1) and repealed by No. 9 of 1922.

the Governor shall not assent, except with prior approval of the Secretary of State, to any law, not containing a suspending clause, by which natives are made subject save as regards arms, ammunition, and liquor, to any conditions, disabilities, or restrictions to which persons of European descent are not subjected. The clause, therefore, applies to any law with legal effect, so that if any Act is passed irregularly it is null and void, and the restriction cannot itself be removed except by legislation which itself must be reserved. Further, the High Commissioner for South Africa is given a definite measure of control over the administration.<sup>1</sup> His approval is necessary to the appointment of the permanent head of the Native Department, of Native Commissioners in their various grades, and Superintendents of Natives; their duties can be varied only with his permission, their salaries increased or diminished, or their removal from office carried out. No differential conditions, disabilities, or restrictions may be placed on natives without the consent of the High Commissioner, unless the details are laid down in a law duly assented to by the Crown; but there is the usual exclusion of restrictions regarding arms, ammunition, and liquor. The lands vested in the High Commissioner by the Southern Rhodesia Order in Council, 1920, shall remain so vested for the sole and exclusive use of the natives, and can be disposed of only as directed in the Order, and then only in exchange for other suitable land. A native may acquire, encumber, and dispose of land, but any contract for encumbering or alienation must be certified by a magistrate to be fair and reasonable, and to be understood by the native concerned. The Governor is required to furnish the High Commissioner with any information he desires relating to native affairs. Moreover, on the High Commissioner's request the Governor in Council must refer any question relating to natives for report to any High Court judge, and the judge shall thereupon make such inquiry as he thinks fit, and shall report to the Governor in Council, who in transmitting the report shall state what action is to be taken in the matter. In case of a revolt against the Government, or other misconduct by a native chief or tribe, the Governor in Council may, with the approval of the

<sup>1</sup> ss. 39-47. It is very dubious if the control means much. A Governor-General is hardly likely to be an active guardian of native rights.

High Commissioner, impose a reasonable fine on the offender. He may also with like approval establish in any native reserve a council of indigenous natives, representative of the local chiefs and other native residents, for the discussion of any matters directly concerning the native population, and may make regulations regarding the meeting of these councils or their joint meeting. He may also make regulations conferring on any council powers of management in connexion with local matters affecting the indigenous natives which can be safely and satisfactorily undertaken by them.

Apart, however, from these specific regulations the control of native races has been managed by the Dominions subject only to the general power of the Imperial Government to suggest measures for their benefit.

## § 2. *Canada and Newfoundland*

In the case of Canada the Imperial Crown was bound by various engagements entered into with the Indian tribes, and control over these matters was not handed over to Canada until 1860, when the Imperial Government ceased to make any payments or to conclude fresh agreements, leaving the whole matter to be dealt with by the Government of the United Province. In the *British North America Act* the principle is to assign by s. 91 (24) the subject of Indians and lands reserved for the Indians to the control of the Dominion Parliament and Government. In the Dominion Acts extending the boundaries of Ontario, Quebec, and Manitoba in 1912<sup>1</sup> express provision is made to reserve to the Dominion the care of Indians and their lands. By s. 13 of the terms of union with British Columbia it was expressly provided that the charge of the Indians and the trusteeship and management of the lands reserved for their use and benefit fell to be assumed by the Dominion Government, and as liberal a policy as that hitherto pursued by the British Columbia Government was to be continued by the Dominion Government after the union. To carry out this policy tracts of land of such extent as had theretofore been the

<sup>1</sup> cc. 40, 45, and 32. In the terms of surrender of the lands of Alberta to the province control was reserved to the Dominion, which was to have the right to receive such lands as were necessary to enable it to keep faith with the Indians.

practice of the local Government to appropriate for that purpose were from time to time to be conveyed by the local Government to the Dominion, in trust for the use and benefit of the Indians on application of the Dominion Government. In case of disagreement between the two Governments regarding the quantity of such tracts of land to be so granted, the matter must be referred to the decision of the Secretary of State for the Colonies.<sup>1</sup>

As has been seen, the legal position of the Indian reserves is anomalous. The right of the Indians does not alter the fact that the land is vested in the provinces in ownership, which becomes real and valuable as soon as the Dominion extinguishes in any area the Indian title by agreement with the Indians. The Privy Council ruling that Canada had no legal claim on the provinces for the refund of expenses incurred in ending the Indian title would have caused complete cessation of such extinction, but in the case of Ontario the matter was amicably arranged by an Act, the *Indian Reserve Lands Act*, 1924, giving effect to an agreement between the Dominion and the province as to the treatment of such cases.

The claim has repeatedly been made by certain of the Indian tribes, in special the Six Nation Indians, that they are not British subjects but allies of the United Kingdom, and the coming into being of the League of Nations rendered it possible to revive with some show of reason the old claim. Efforts were made at the Assembly of 1923 to have the treatment by Canada of the Indians made a subject of discussion, the representative of Persia moving actively in this sense, with a laudable desire for the spread of those democratic principles for which Persia is noted. Ultimately the Canadian representatives, who had found the issue tedious and had been surprised that it should be seriously taken up, were successful in securing the ruling that the Indians had no *locus standi*.<sup>2</sup> Fortunately, by assuring the tribes of their anxiety to further their education and to pay just attention to their grievances, it was found possible to come to an amicable settlement with the Six Nations in 1925. The Indians in Canada showed a praiseworthy interest

<sup>1</sup> In view of the great expense incurred in 1911 (c. 24) in securing the removal of the Songhees Indians' reserves in British Columbia, an Act (c. 14) was passed to arrange for taking of reserves compulsorily, on compensation, with Parliamentary approval.

<sup>2</sup> *Canadian Annual Review*, 1923, pp. 209 ff.

in the British side in the war, in which no small number fought, and as a reward all those who had done so were by the legislation of 1917 and 1920 secured the franchise, even in those cases in which, under the disqualifications of provincial laws applied to Dominion elections also by the Franchise Act of 1920, they would otherwise be ineligible.

The policy of the Dominion has been to assure the Indians in their reserves and to assist them as far as possible to secure education for their children, to rise in civilization, and to become full citizens when they so desire. Their lands are fully secured, and, when more areas are required, there is readiness to supply them, though in British Columbia difficulties have arisen by reason of the fact that the provision made before federation by the local government was decidedly inadequate, and some difficulty has been experienced in inducing the province to conform to the standard of generosity of the Dominion. A certain measure of agreement was reached in 1923, but no full accord. Lands superfluous because of the diminution of Indian bands are acquired by the Dominion Government, but every care is taken to secure that sufficient lands are left in their hands. The Minister of the Interior is also Superintendent-General of Indian Affairs, charged with the control of the measures taken for their welfare. In 1920 an effort was made by Mr. Meighen in that capacity to improve the education and hasten the enfranchisement of the Indians, who then numbered 105,998 settled in 1,625 reserves, nearly half the total being distributed fairly equally between Ontario and British Columbia. Every Indian child between seven and fifteen, if physically able, was to attend school, and the Governor in Council was empowered to establish day, industrial, or boarding schools for Indians. Moreover, a code of compulsory enfranchisement was planned; the Superintendent-General was empowered to appoint an officer to report on the fitness of any Indian for enfranchisement, and, if his report was favourable, the Governor in Council might enfranchise that Indian, giving him, his wife and children the status of ordinary British subjects. It was also provided that any Indian woman who married a non-Indian ceased *ipso facto* to enjoy Indian status. The compulsory enfranchisement proposed by Mr. Meighen was defended on the ground that Indians ought to be made independent of

the Government, and taught self-reliance, but the Indians objected bitterly to it on the perfectly legitimate score that an enfranchised Indian became entitled to receive a definite proportion of the treaty money paid to the band, and to have a portion of the tribal land allotted to him, which he might then sell to a European, with the result that the area for the tribe was diminished and broken up. The Six Nation Indians were specially loud in protest, and in 1922 Mr. Meighen's Act was amended to abolish this power of compulsion, substituting instead an investigation of any desire by an individual, or the majority of the male members of a band, for enfranchisement, by a board of two officials and a member of the band, and insisting that an essential feature of the investigation must refer to the man's desire to be enfranchised. This wise and just Act was somewhat bitterly opposed by the Conservatives, who renewed the attack in 1924, when the Government secured the passing of a Bill to give the Superintendent-General control over Esquimaux<sup>1</sup> affairs, a step necessary in view of the growing contact of the white men and these natives. The Act further removed a doubt created by the badly worded Act of 1920, and revived the terms of the Act of 1918 which provides for the enfranchisement of any Indian not living on a reserve or holding land there, who applies for enfranchisement, and is willing to take his share, if any, of the treaty money due. The same Act permits an unmarried Indian girl of twenty-one and over, and a widow and her minor children to obtain enfranchisement in the same way.

In 1923 a measure of agreement was at last reached between British Columbia<sup>2</sup> and the Dominion for a settlement of the Dominion claims for extra lands for the Indians, while a Joint Royal Commission of the Dominion and Ontario Governments arranged the settlement for 500,000 dollars, to be paid by Ontario, of the claims of the Chippewas and the Mississaugas of Huron and Simcoe counties for the loss of hunting and fishing grounds in northern and central Ontario; the Commission bore emphatic testimony to the transparent honesty of the Indians and their real attachment to the British connexion.

<sup>1</sup> Cf. Bernier, *Cruise of the Arctic*, 1908-9, pp. 316 f.

<sup>2</sup> Cf. British Columbia *Sess. Pap.*, 1907, F. 33; 1908, D. 47. For the legal issues see Part IV, chap. i; Ontario *Sess. Pap.*, 1908, No. 71; for the settlement cf. Ontario Act, 1924, c. 15. For Quebec see Act of 1922, c. 37.

The future of the Indians is uncertain ; Mr. Forke, National Progressive Leader, has borne testimony to their natural intelligence, but there is no doubt that contact with white men has deteriorated them in physique and morale ; but enfranchised Indians can easily blend with the rest of the population, while the others will probably in time die out ; there seems no doubt that Canada has absorbed no small amount of Indian blood to its benefit.

In Newfoundland the natives are few, though there is a settlement of Micmaes who enjoy no great prosperity. In Labrador, which has suffered from the poverty of Newfoundland as well as the rival claims of Quebec, there is little administration, but Dr. Grenfell's mission work has been followed up by voluntary effort.

### § 3. *New Zealand*

The early history of the relations of the European settlers in New Zealand with the Maoris is not satisfactory.<sup>1</sup> By the treaty of Waitangi in 1840 the native chiefs and people were guaranteed possession of their lands, the Crown being given the right of pre-emption if they wished to sell. The Imperial Government, of course, retained full power over relations with the Maoris, and the Constitution of 1852 contained a clause (71) which authorized the Crown by letters patent to provide for the adoption of the laws and customs of the aborigines in all dealings among themselves, and to declare to which districts this rule should apply. But this well-intended measure never came to anything, and the Governor, who still, despite the grant of responsible government, was supposed to manage native affairs, had no real touch with them and did nothing to bring them peace or prosperity. He ended in being involved in an unjust war caused by the decision to accept the surrender of land which a chief, who had no right to surrender it, wished to hand over for a consideration. On his retirement Sir G. Grey became Governor and was induced to decide to act on ministerial advice in his native policy, though the Imperial forces were the chief means of carrying out the acts of repression which the attacks

<sup>1</sup> See Rusden, *New Zealand* ; Sir A. Gordon, *Parl. Pap.*, C. 3382. The Maoris were formally declared British subjects—needlessly—by Act No. 11 of 1865, s. 2 (consolidated in No. 126 of 1908).

on the natives made necessary. Unfortunately for peace, the device occurred to the Ministry and Sir G. Grey to punish those who defied their authority by confiscations, and a period of war ensued, during which from 1864-6 a net total of 3,568 square miles of valuable land were appropriated, and Sir G. Grey fell foul of the Imperial Government and forces. On his retirement in 1867, the British forces had been reduced to one regiment, which was withdrawn in 1870, but his successor in 1868-71 was involved in a further more or less needless war. A minor outbreak was brought about in 1880-1 by tactlessness, and again in 1886 there was unrest, but in 1888 the Maoris affirmed their approval of the principle of the co-operation of Maoris and Europeans as one people and loyal obedience to the laws of the King. Indeed throughout it is difficult not to feel that they were much more sinned against than sinning, the lure of their lands being, as in Kenya, too much for the covetousness of the colonials.

In 1867<sup>1</sup> a step of great importance was taken in appointing four native members to be elected by Maoris to be members of the House of Representatives, and from 1872 two Maoris were added to the Council. The maintenance of the number of the Maori representatives as against 91 Europeans in 1881, 70 in 1890, and now 76, gives the Maori voter rather more representation proportionately than the European, and the Maoris have often had great weight in a nicely balanced House, it being their custom to use their influence to support the party which is most considerate of their needs. The presence of a half-caste Maori on the Executive Council was secured in 1899 and affords an excellent method of securing that due attention be paid to the interests of the native race, whose numbers after a long period of stagnation have commenced to increase, until they have reached some 54,000. To these must be added a number of half-castes, all of whom in the South Island live as Europeans, while most Maoris there do so likewise, and it was anticipated that by 1926 there would in that island be no real cultural difference. The merger of the race seems indeed inevitable, but it may be a slower process than was expected.<sup>2</sup>

The question of securing the natives in their lands was first

<sup>1</sup> The abortive constitution of 1846 (9 & 10 Vict. c. 103) would have excluded Maoris from the franchise, and that of 1852 was not much better.

<sup>2</sup> A Maori may adopt a European; *Arani v. Public Trustee*, [1920] A. C. 198.



seriously considered in 1861 as a result of the war, and in 1865 the Native Land Court was established. As early as 1880 native assessors were used, and in 1883 elective committees were established to advise the Court, while later Land Boards came into existence. The present system is complex; the Native Land Court deals with questions of title, partition, exchange, succession and similar matters. Maori Land Boards, composed of a judge and a registrar, deal with the confirmation of alienations, the sale or lease of lands vested in them, and the administration of native blocks as farms. The Native Trustee administers all lands held in reserve for natives and grants leases for them. Maori Councils, consisting of an official member, usually European, and elected Maori members, supervise Maori settlements especially in matters of sanitation. It seems as if, under the *Native Land Act*, 1909, No. 15 (amended by No. 82 of 1910 and later), an important consolidation and extension of earlier Acts, there is now too rapid and extensive an alienation of native land, no less than 2,852,821 acres being alienated up to 1924, while the remaining land was only some 4,591,456 acres. Lack of capital renders pastoral and dairying use of the land difficult, and, unless more extended use is made of them, it seems as if there might be serious pressure on Maori means of subsistence. The temptation, of course, to encourage alienation is great, as land for settlement is not very plentiful.

The Act of 1909 gives abundant power to the Native Land Court to recognize the complex land laws of the Maori tribes. The position of the land has been elucidated by a number of judgements of importance. The older *Wi Parata v. Bishop of Wellington*<sup>1</sup> was long deemed to assimilate the native title to that of the Indians of Canada, and to render it dubious how far it would be protected by the Courts, for it ruled that, once a grant was made by the Crown, it could not be questioned on the score that it had been made without extinguishing the native rights. In *Nireaha Tamaki v. Baker*,<sup>2</sup> however, the Privy Council insisted that native land had been recognized by statute, and that an action could be brought in respect of it in the Supreme Court. In *Tamihani Korokai v. Solicitor-General*<sup>3</sup>

<sup>1</sup> 3 N. Z. J. R. (N.S.) S. C. 72; *Reg. v. Symonds, Parl. Pap.*, Dec. 1847, p. 64.

<sup>2</sup> [1901] A. C. 561. Cf. *Willoughby v. P. Waihopi*, 29 N. Z. L. R. 1123.

<sup>3</sup> 32 N. Z. L. R. 321; Keith, *Imperial Unity and the Dominions*, pp. 173-9.

the Supreme Court, after a full investigation, pointed out that the Act of 1909 secured the native title completely, and made the Native Land Court the proper Court in which to deal with any question arising out of it, such as the claim of certain natives to have an exclusive right to fish in part of Lake Rotorua. It was attempted by the Solicitor-General to argue that the mere statement on behalf of the Crown that the bed of the lake was Crown land free from all native title was sufficient to dispose of the matter, but the Court would not accept this view of the prerogative, which, even if it existed, they ruled could not be adduced without authority by the Solicitor-General. It appears, therefore, that the title to native land in New Zealand is now completely safeguarded, subject to the power of the Crown by proclamation to declare under s. 85 of the Act of 1909 that the right has in any case been duly extinguished. That by legislation, or by action under legislation, the title of the natives can be extinguished is admitted on the ground that such legislation is a matter of eminent domain, but the Crown has no right simply to issue a Crown grant, and to claim that that binds the natives.

Native education was first systematically encouraged by an ordinance of 1847, and further sums were provided by legislation of 1858 which allotted £7,000 a year for the purpose, but not until 1871 was any real progress made by the adoption of a workable system. In 1879 the work done justified transfer of control from the Native Department to the Education Department, which in 1925 was educating over 6,000 children in 124 schools, while an equal number attended European schools along with European children.

The loyalty of the Maoris showed itself prominently in the Great War, as did that of the Cook Islands, which by Imperial Order in Council were included from 10 June 1901 within the boundaries of New Zealand but have a special form of administration under Acts of 1915 and 1921. The Act of 1915 provides that a member of the Executive Council shall be Minister for the Cook Islands, with a Secretary for the Islands in New Zealand, while there are Resident Commissioners at Rarotonga and Nive, with Resident Agents in other islands if necessary. The Act also established Island Councils at Rarotonga and Nive, authorizing the establishment of further Councils if

thought desirable. These bodies consist in whole or part of *ex officio* members being European officials or Arikis, native chiefs, nominated members who hold office during pleasure or for not more than five years, and members elected by the people, women being eligible as members and electors. These Councils have power to make laws for the peace, order, and good government of the islands, subject to New Zealand legislation, but they may not impose duties of customs, create courts, borrow money, or appropriate revenue other than that raised by their own legislation. The assent of the Resident Commissioner or the Governor-General is necessary for the validity of an ordinance, and it may be disallowed within a year after assent by the Governor-General. The Act of 1921 added an elective European member to represent the European community in the Council of Rarotonga. There is a High Court with a Chief Judge at Rarotonga and a judge at Nive, while Commissioners may exercise powers in the other islands, but subject to appeal. An appeal lies from the High Court to the Supreme Court of New Zealand, which also has original jurisdiction, and the decrees of the High Court and the Supreme Court may be enforced by the other. An elaborate code is provided for criminal cases; there is a Native Land Court to deal with native land, which is governed by regulations on the basis of those of the Maori lands of the Dominion. Education is an object of much interest, technical education being specially popular, while the manufacture or importation of intoxicating liquor is absolutely prohibited, and efforts are made to put down the use of bush beer by the natives.

By Imperial Order in Council of 30 July 1923 the territories of the Crown between 160° east and 150° west longitude and south of 60° south latitude were created a unit under the Governor-General of New Zealand as Governor of the Ross Dependency. By regulations of 14 November 1923 the laws of New Zealand as a whole were brought into force in the Dependency, whose importance consists of its service as a whaling station. As the territories can only be regarded as a colony by settlement the validity of these regulations is most dubious, as the *British Settlement Act*, 1887, seems only to allow delegation of legislative power to three persons at least.<sup>1</sup>

<sup>1</sup> Cf. the *Pacific Islands Regulations (Validation) Act*, 1916.

§ 4. *Australia*

In Australia the aboriginal race at the time of settlement may have numbered as many as 150,000, but this is mere guesswork ; what is certain is that in New South Wales and Victoria the contact with the European race rapidly proved fatal to the numbers of the natives, and that in the other colonies the same phenomenon has been observed, the Australian native being, if not primitive in any accurate sense of the term, an unfortunate species of the human race, who developed, in isolation from external influences it would seem, a complex social system which is in itself far from satisfactory to others than researchers into the origin of totemism, and in any case is useless to safeguard him from European destructive influences. The total numbers of the present day are speculative, but not probably more than 63,000, with 13,000 more half-castes ; in Tasmania the last full-blooded aboriginal, the last remnant of a very peculiar race, died in 1876, and the great majority of the natives are to be found in Western Australia, in the Northern Territory, and in Queensland. Little more can be done in New South Wales and Victoria, which have both excellent legislation <sup>1</sup> for the care of the aborigines, than secure them lands and supervision as they dwindle away ; in 1925 New South Wales was spending about £35,000 on 1,554 full-blooded natives and some of mixed blood, while Victoria's Aborigines Protection Board had 317 under its care at a cost of £6,000. In South Australia <sup>2</sup> at the end of 1924 there were about 650 in attendance at mission stations, and the total cost of the aborigines is about £25,000 annually ; before handing over the Northern Territory an elaborate Act, No. 1024, was passed to secure the natives from unfair treatment. The Commonwealth spends on them about £10,000 a year, and about 1,500 were in residence at the mission stations, while much larger numbers received occasional assistance when they chose to come within the limits of civilization. In Queensland <sup>3</sup> the aborigines are of value in the pearling fishery as well as in regard to the care of stock ; in 1923 there

<sup>1</sup> Act No. 25 of 1909 (New South Wales) ; Nos. 1059 and 2257 of 1890 and 1910 (Victoria).

<sup>2</sup> *Ass. Deb.*, 1910, pp. 647 ff., 673 ff., 696 ff., 709, 721.

<sup>3</sup> See the Acts of 1897 (No. 17) and 1902 (No. 2) establishing the department to care for aborigines. Cf. *Parl. Deb.*, 1910, pp. 1032 ff., 1610 ff.

were 3,755 in residence at mission stations, while the annual expenditure is about £40,000. Contact with foreigners in the pearling trade has undoubtedly not resulted in the benefit of the aborigines. The Kanakas, who formerly were imported from the Pacific Islands, were removed finally under the authority of a Commonwealth Act (1901-6).

In all these cases the Imperial Government made no effort on the grant of responsible government to reserve for itself any authority. In the case of Western Australia matters were different, and Sir Napier Broome, the Governor, while pressing for responsible government, urged that the Board established in 1886 to look after the interests of the natives should continue to be under the Governor. This plan was adopted in the Constitution of 1890, though the Ministry resented it. It was motivated in large measure by the very unpleasant situation prevailing. The natives had no lands allocated definitely to them; they roamed about and killed the settler's cattle, and he in desperation used to take savage vengeance on them, assured that a jury of fellow sufferers would find him not guilty of any serious charge. But though the department was under the Governor, and he had a grant of £5,000 from the Consolidated Fund for the benefit of the natives, the scheme worked badly. The amount was too small for any serious purpose, and the Ministry, taking the view that its authority was diminished in the eyes of the people and the aborigines, sulked and tried rather to hamper than help the Governor in his administration. In 1894 a Bill was passed by the Legislature to end the Governor's control, but it was reserved and never assented to. Sir J. Forrest, however, at the Colonial Conference of 1897<sup>1</sup> persuaded Mr. Chamberlain to consent to the Colonial Government accepting full responsibility, and sanction was duly given to Act No. 5 of 1897, which ended the system. The Act, however, was not duly proclaimed, as it should have been after the royal assent, and had to be re-enacted with modifications as Act No. 14 of 1905. The measure provided as far as possible for safeguards against ill-treatment, for provision for indigent and infirm natives, and protection against fraud by employers. There still remained the difficulty of the lack of respect for natives on the

<sup>1</sup> See *Parl. Pap.*, C. 8350. Cf. Battye, *Western Australia*, pp. 383 f. 395 f., 403.

part of the settlers, while exploring expeditions were too fond of treating natives as potential enemies, and even the legal practice of handcuffing natives and conveying them, when suspected of crime, long distances to prison was susceptible of serious abuse. The Government, however, in an Act, No. 42 of 1911, showed its anxiety to assist the natives by providing for the better education and care of half-castes, which, though involving removal from parents, gave them a better chance of a more happy and useful life ; it also allowed the setting aside of reserves in excess of the former limit of 2,000 acres, and forbade any native to plead guilty to a charge without permission of the Protector, a very necessary provision, as natives had often been known to plead guilty in order to propitiate their captors. Efforts have been made by the allotment of reasonable areas and the gift of cattle to induce the natives to settle down and stop raiding the cattle of the settlers. In 1924 the number of those natives cared for in native institutions was 540, and the average annual expenditure on natives is about £31,000. The total expenditure in the Commonwealth has grown in a satisfactory manner of recent years, being now over £150,000 as compared with £56,000 in 1906. Efforts are made at all the institutions and mission stations to encourage the natives to do such work as they can manage, while elementary education is given to the children. The future of the aborigines is far from promising. The franchise is denied to them in Western Australia, Queensland, and the Northern Territory.

In Papua <sup>1</sup> the natives, who are, quite by guesswork, asserted to number about 275,000, are in the main virile, and their health is cared for by two travelling medical officers with an assistant, who are training native assistants. The land rights of the natives are fully respected, and the considerable areas of Crown land are dealt with on the system of leasehold with reappraisal on unimproved value. Labour contracts are carefully regulated to provide for their voluntary character, and the proper treatment and food of the natives ; a magistrate must satisfy himself that the native is willing and will not be detained or ill-treated ; the period may not exceed eighteen months for carriers or mining, three years in other cases, and the remunera-

<sup>1</sup> J. H. P. Murray, *Review of the Australian Administration in Papua from 1907 to 1920*.

tion must be fair and wages paid before an officer. Refusal to work or desertion are, however, penal offences, though a magistrate may cancel a contract if there is ill usage or unjust treatment. The main defect of the system is the failure to secure that there shall be provided shops where natives can buy their needs at moderate prices, the result being that they spend their earnings at booths kept by their employer, returning their wages in excessive charges. Women may not be indentured for plantation or mining work, but may accompany their husbands. Skilled labour is gradually being taken up, such as driving motor launches, navigating sailing launches, caring for mining machinery, motor lorries, and carpentry work, a system of registration and certification of engineer mechanics being in operation. Under the *Native Taxes Ordinance* of 1918 a tax may be imposed on natives fit for work, the proceeds of which must be spent on native education and like matters, and efforts to spread education are being pursued. By an ordinance of 1922 fathers are made to pay £26 a year for a boy until sixteen, for a girl until eighteen, in order that the Commissioner for Native Affairs may see to the care of half-caste children who are being neglected; in 1921 the half-castes numbered 158, while coloured persons not Papuans numbered 577; the white population is about 1,370. All land must be acquired from the Government, which obtains surrenders by the natives who hold the overwhelming bulk—over 56 million acres—of the area, direct dealings being forbidden. The Government, in the interests of the natives, supervises strictly immigration; it has refused firmly to consent to indentured immigration as detrimental to native prosperity, and it has absolutely refused all the suggestions to allow forced labour for the benefit of Europeans. Papuans, of course, like other coloured persons, are not eligible normally for entrance to the Commonwealth, save on temporary permit for special purposes.

### § 5. *South Africa*

In the rest of the Dominions of minor account, in the Union of South Africa the problem of the natives is of fundamental moment. The census of 1904 showed 1,116,806 of the European population to 4,059,018 non-European, and in 1921 the figures

were 1,519,488 to 5,409,092, of whom 4,697,813 were Bantu, 165,731 Asiatic, 545,548 mixed and other. The estimates for subsequent years indicate no prospect of any fundamental change in the proportions, and it is natural to assume that the Bantu population is growing at a rate which, unless the European is reinforced by migration, will give it steadily a greater predominance.

The treatment of natives has differed fundamentally in the Cape and the rest of South Africa.<sup>1</sup> In the Constitution of the Cape as settled in 1852-3 the principle was adopted by the Duke of Newcastle that natives should have the same political rights as the white man, and the changes in this doctrine since adopted in the Cape have only been in accordance with the principle of Cecil Rhodes that there should be equal rights for all civilized men south of the Zambezi. Thus the legislation of 1892,<sup>2</sup> which terminated the possibility of claiming a property qualification on mere tribal tenure, and the requirement of ability to write one's name, secure that electors shall not be merely the instruments of a tribal chief or some European manipulator. The number of such voters in the Cape is about 41,000, having risen steadily from the 21,000 of 1909, and they number about a fifth of the whole of the voters. It is true that the vote is resented by those white voters who object to any security for fair treatment being accorded to natives, and the prejudice of the other colonies succeeded in 1909 in excluding any native from eligibility to be elected a member of Parliament, but the franchise was left untouched and protected by the provision above quoted.

The results of the equality of voting power have been that in the Cape the native has been allowed, save in the Transkeian

<sup>1</sup> Cape *Parl. Pap.*, 1909, A. 2 and G. 19; 1910, G. 26; Wilmot, *South Africa*, ii. 173 ff., 196 ff.; iii. 22 ff.; Vindex, *Cecil Rhodes*, pp. 361 ff.; *Parl. Pap.*, Cd. 2399, 3889 (as to Natal, Acts No. 1 of 1909 and No. 29 of 1910, being the outcome of the investigations reported therein). For de Villiers' protests against the acquittal of the Kogas murderers in 1879 (due to the carelessness of the incompetent Upington as Attorney-General), see Walker, p. 144, and his assertion of law in favour of the natives in *W. Kok v. The Queen*, 1879 Buch. 75; and Sigcau's case (1895); Walker, pp. 258 ff.

<sup>2</sup> The £25 yearly occupation franchise was raised by the *Franchise and Ballot Act*, 1892, to £75, while the very low owners' qualification, almost entirely confined to Europeans, remained; B. Williams, *Cecil Rhodes*, pp. 205 ff.



area, which is predominantly the home of less civilized natives, freedom of movement without the restriction of pass laws, and steady effort has been made for his education and advancement in life, no artificial barriers being erected to prevent his acquiring skill as a worker or receiving the benefits of that skill. Moreover, as the outcome of long and patient effort, the Cape natives forced the Government to admit the right of their securing higher education up to professional standard, an ideal carried out in the South African Native College, which took definite shape in 1914 and in 1923 was recognized as a place of higher education and entitled to receive grants under Act No. 30 of that year.

The Cape is also distinguished by its adoption of institutions tending to encourage the natives where congregated thickly to govern themselves in part. Thus the *Glen Grey Act*,<sup>1</sup> No. 25 of 1894, established a Council, presided over by a magistrate and composed of six members nominated by the Governor—now Governor-General—and six elected by the Location Boards also established by the Act; the Council levies rates and spends it on roads, irrigation, dipping of cattle, improvement of agriculture, an experimental farm, and public health. The Transkeian Territories have similarly been given since 1895 an elaborate constitution, with District Councils consisting of a magistrate and six members, two nominated by the Governor-General and four elected by the representatives of the rate-payers; these hold office for three years, and each November nominate two members of the General Council, to whom a third is added by the Governor-General, while to complete the body are added the Chief Magistrate and the other magistrates, making a body of eighteen magistrates and fifty-four native members. This General Council serves as an advisory body on all matters affecting natives which may be brought before it, and the District Councils can send up resolutions. Its views have no binding force. Its revenue is mainly derived from a rate levied by the Union and paid over to it, while its expenditure is approved by the Governor-General. Its chief activities, which are carried out by the District Councils acting as its

<sup>1</sup> Inalienable tenure by individuals was given, but not the franchise, as desired by the Opposition; Walker, *Lord de Villiers*, pp. 258 ff. Rhodes's protean nature was consistent with a policy of native exploitation in Rhodesia.

administrative organs, are concerned with roads, of which it maintains 3,200 miles; dipping of stock; maintenance of wattle plantations; provision of hospitals; contributions to supplement salaries of native teachers; the maintenance of two agricultural schools and three farms to inculcate improved methods of agriculture and stock breeding; and experiments in cotton culture. In Western Pondoland since 1911 there has been a General Council, with three District Councils, but the members of the former are nominated by the Paramount Chief and its functions are somewhat limited.

In the other colonies the native right to the franchise was never admitted, as regards the Transvaal and the Orange River Colony part of the condition of the final surrender of the Boers having been that the step should not be taken before representative government was accorded, while in Natal the possibility of obtaining a vote, which at first existed, was gradually so limited that only some 450 native voters exist as compared with 34,000 other electors. Inevitably the doctrine of racial inferiority—the Transvaal and Orange Free State Constitutions would tolerate no equality whether in state or church, and the union of the Dutch Reformed Church by Act No. 23 of 1911 expressly denies to natives of the Cape equality with Church members outside that province, in flagrant defiance of Christian principle—has resulted in a systematic treatment of the native as an inferior. He is subjected to a system of pass laws which are devised to keep him under strict supervision and hamper freedom of choice of work, and, though the defects of the system were recognized by the South African Native Affairs Commission of 1903–5, by a Select Committee on Native Affairs appointed by the Assembly in 1914, by a Departmental Committee appointed in 1919, whose report was only issued in 1923, and by the Native Affairs Commission established under the Act of 1920, the Native Registration and Protection Bill of 1923 was far from satisfactory, and even so was much opposed, with the result that it was withdrawn for further consideration. Exemptions from disabilities placed on natives are available in Natal under law No. 28 of 1865, passed in the days of Imperial control, under which natives male and female of advanced civilization can obtain exemption from the restrictions on natives in general. But the narrow and ungenerous policy of

Lord Milner was unfavourable to the natives, and all that he did by Proclamation No. 35 of 1901 in the Transvaal, and Ordinance No. 2 of 1903 in the Orange River, was to exempt well-educated male adult natives following certain defined occupations from the pass laws, and in the Transvaal from native taxation and certain specified laws oppressively affecting natives.<sup>1</sup> The experiments in encouraging natives to share in their own control, which are noteworthy in the Cape, have been far less popular in the other provinces. The most important is the Witzieshoek Reserve in the Orange Free State, which represents an area assigned to Paulus Mopeli, a chief who in 1867 voluntarily accepted Free State rule. The reserve has a Council of two Europeans and five nominated natives for local governmental purposes, while the chief exercises civil jurisdiction subject to appeal to the Commandant, who alone has criminal jurisdiction. The desirability of an extension of the Councils system was recognized in the Native Affairs Act of 1920, but action has as usual indefinitely tarried. Expenditure on education has been very low ; by Act No. 5 of 1922 the provinces had to be compelled to spend as much annually on education as in 1921-2, and the Union undertook to find grants, which in 1924-5 reached £60,000, a satisfactory beginning to deal with long arrears.

Since the Union, which was strongly commended by Lord Selborne on the score that uniform policy as to natives would become popular, efforts have been made to effect settlement of the issues of the land, of native government, and of labour, but with inadequate results. The Parliament, as has been mentioned, contains four Senators who are nominated because of their assumed acquaintance with the reasonable wishes of the native population, but they naturally have not exercised much influence on legislation. In the *Defence Act*, 1912, s. 7, the principle of refusing to allow natives to be used for the defence of their country was homologated, and the natives were not permitted the honour of fighting in the war, though every civilized power made use of native aid, and European South Africans suffered severe losses at native hands in General

<sup>1</sup> The credit for such concessions as were made is due to Mr. Joseph Chamberlain, the last Secretary of State for the Colonies animated by the old-fashioned belief in fair treatment for natives. Cf. *Parl. Pap.*, Cd. 714, 904.

Botha's attacks on the German forces in East Africa. In 1913 the land question was taken up, native land tenure being in a condition of the utmost confusion, natives living sometimes on tribal lands—of which vast areas in Natal and Zululand were held by trusts whose powers, under Act No. 1 of 1912, may be handed over by the Governor-General in Council to the Minister for Native Affairs—or squatting with varying degrees of legal authority on private or Crown land, or holding on ordinary European tenure. The Orange River Colony in 1908, by Act No. 42, sought to deal with squatting, but the Imperial Government refused the assent requisite, because it was felt that the subject must be taken up by the Union. Assent, on the other hand, was readily given to the Cape Act No. 29 of 1909, providing for Boards of Management of communal reserves attached to mission stations, which superintend the affairs of these reserves. The Act No. 27 of 1913<sup>1</sup> was based on the dogma of the desirability of separating natives and Europeans as regards land tenure. As a preliminary step it scheduled a number of areas, and provided that in these native areas no person other than a native might acquire land, or an interest therein, save with the approval of the Governor-General in Council; similarly, without such approval, outside these areas no native should be able to acquire land from a non-native, and a non-native should not be able to acquire land from a native. The essential part of the Act was the provision of a Commission to report on the question what areas should be assigned for native, what for non-native occupation exclusively. The commission under Sir W. Beaumont reported in 1916, and a Native Affairs Administration Bill of 1917 was drafted to carry out the principles of the system. It was closely scrutinized by a Select Committee on Native Affairs, on whose recommendation five local commissions further investigated and reported, their reports, received in 1918, turning out to be based on diverse principles and agreeing chiefly in the determination not to give the natives any land of value beyond what they actually had. The Union Government, however, made in practice some use of these reports, for it consented to accept acquisition of lands by natives in the areas suggested for them by the Local Committees, while, on the other hand, it decided

<sup>1</sup> Cf. Keith, *Imperial Unity and the Dominions*, pp. 183 ff.

that it would no longer acquire private lands in such areas for the purpose of giving grants to the natives, leaving them to acquire them by purchase or lease, though Crown lands would be made available for use, but not transferred without sanction of a law. This was the position adopted in the Transvaal and Natal; in the Cape the restrictive provisions of the Act of 1913 were fortunately declared by the Appellate Division not to apply to that province, leaving the natives as free as before to acquire land, while in the Orange Free State no native can acquire a right over land at all, an iniquitous state of the law which should long before have been altered. The difficulties of the position may be appreciated when it is recalled that Sir W. Beaumont reported that his recommendations were admittedly artificial owing to bitter opposition to any inclusion of areas where Europeans had any farms, and that it was pointed out that the report of 1916 meant giving 87 per cent. of the land to 1,250,000 Europeans, and letting 4,500,000 natives have the rest.

The natives not unnaturally felt that efforts were being made to deprive them of reasonable areas, and to compel them to work as wage earners for Europeans, and unrest was increased in 1918, when high prices on the Rand pressed heavily on native workers, whose efforts to strike were countered by prosecutions under the *Riotous Assemblies and Criminal Law Amendment Act*, 1914, on the score that they had broken their contracts, a penal offence. Serious rioting followed, and General Botha had to use his influence to calm the unrest, the malcontents urging in the interview he gave them deficient educational facilities, oppressive pass laws, and the colour bar.<sup>1</sup> This was imposed by regulations under the *Mines and Works Act*, 1911, and forbade any native in the Transvaal and Orange Free State being employed in any skilled work on a mine, in all some thirty-two occupations being reserved to 7,000 Europeans, while an agreement between the owners and the workers in July 1918 recognized some nineteen further occupations as the preserve of 4,000 Europeans. The arrangement was absurdly uneconomic, and in 1920 the Low Grade Mines Commission emphatically suggested its removal.

The Government, gradually losing prestige in the country,

<sup>1</sup> Keith, *War Government of the Dominions*, pp. 328 ff. See also W. H. Willoughby, *Race Problems in the New Africa*.

contented itself in 1920 with passing a *Native Affairs Act*, No. 23. The Act creates a Commission of not less than three nor more than five members, meeting under the Minister for Native Affairs, which considers any matter relating to the general administration of native affairs or legislation in so far as it affects the native population, other than matters of departmental administration. If its views are rejected by the Minister, it can insist on a decision by the Governor-General in Council, and in the last resort may insist on the papers being laid before Parliament. The device, borrowed from the scheme scheduled in the *South Africa Act* for the Government of other native territories which may be transferred to the Union, is intended to secure permanence and continuity in native policy. The Commissioners also are permitted to be members of Parliament, though paid, and thus to influence the Legislature. The Act further authorized the creation of local councils for native areas, with powers as to roads ; drains, dams, furrows, water supply ; eradication of stock diseases ; destruction of weeds ; sanitation ; hospitals ; methods of agriculture ; and educational facilities, with power to raise rates ; such councils to have an official chairman. Further, authority was given for convening formal meetings of native chiefs, members of native or local councils, or other leading natives, to discuss matters of importance to the natives, thus reviving the provisions above cited of the Transvaal and Orange River Colony constitutions. In this case action was taken on the power ; a Conference attended by the Native Affairs Commission was held in September, 1922, to discuss the Natives (Urban Areas) Bill ; another in 1923 to consider the Native Marriage Bill and the Native Registration and Protection Bill, while one in 1924 led up to the enactment next year of a comprehensive measure on native taxation. The goodwill of the Commission to the natives, its desire to help them, and to induce public feeling in the Union to realize its elementary duties to the natives, are beyond question.

The chief fruit of the efforts of the Commission are contained in the *Natives (Urban Areas) Act*, 1923, which is a serious effort to deal with the problem of affording natives in urban areas proper protection and security, the older legislation having been vitiated by the fact that, especially in the Orange Free State, it was mainly directed to depressing the status of the natives,

that the municipalities regarded the natives with contemptuous indifference, and the natives accepted their lot with resignation. The Act defines the powers and duties of urban local authorities with respect to natives, requiring them to set aside land for the accommodation of the natives. It provides where expedient for compulsory residence of natives with certain exceptions in locations, native villages or hostels, and gives to the local authorities powers of expropriating land and borrowing money to meet the responsibilities thrown upon them in this regard. The Act lays down certain principles to be followed in the administration of native affairs, such as the establishment of a native revenue account and of native advisory boards, and makes provision for Government inspection. In view of the responsibility thrown on local authorities the Governor-General is authorized to confer, or exercise by proclamation, certain powers of control, whereby the native population may be limited to the number legitimately required for the needs of the community. These powers may also be exercised in industrial areas other than those under the jurisdiction of an urban local authority. The Act prohibits the introduction of intoxicating liquor into locations, native villages, or hostels. It limits trading in such places to native enterprise supplemented by municipal action, if necessary, and allows kaffir beer making in certain cases.

Unfortunately the rising tide of European jealousy of native labour was being favoured by economic conditions. At the close of 1921 the owners, terrified by the difficulties of securing profits, meditated the freer employment of skilled native labour. The outcome was the desperate strike on the Rand in January to March 1922, which led up to an attempt at revolt and cost 230 lives before it was finally suppressed. The Nationalist Farmers had sympathized with Labour, now 75 per cent. South African, and in April General Hertzog proposed the alliance of Nationalists and Labour which won the election of 1924. The attack on the colour bar was then averted, but in November 1923 <sup>1</sup> it was held in *Attorney-General v. G. H. Smith* that the legal colour bar by regulation was *ultra vires*, differentiation of this sort on colour grounds being manifestly, in the view of the Court, a thing which must be laid down, if at all, by an Act.

<sup>1</sup> See *J. C. L.* vi. 215 ff.

In February 1925 the new Government introduced a measure which definitely by name sought to differentiate against natives and Asiatics by shutting them out from a long list of appointments where skill was needed, and this despite the fact established by the governmental Mining Regulations Commission of 1924-5, that many of the so-called skilled miners were merely men with blasting certificates, who had learned what they knew from native subordinates. The Bill was attacked by General Smuts as making for the first time statutory a colour bar forbidding the natives to acquire skill; as extending to the Cape and Natal a disability never known before in either; as a challenge to 'black Africa and yellow Asia' by its nominative attacks. The case for the Bill rested on the new policy of segregation; Europeans could not compete successfully with natives, nor, if there was not separation, could work be found for unskilled Europeans, whom the new Government was employing at thrice the cost of natives on the railways; in its logical form the proposal was that natives should be confined to reserves and forbidden to work for Europeans, while the poor Europeans should be set to do the work in towns and farms which natives used to do. In this form something might be said for the proposal, as it was said by Colonel Cresswell in 1920 before he undertook ministerial responsibility. But the Government admitted that it did not propose to treat as natives the coloured population, including both Cape Malays<sup>1</sup> and the Creoles of Mauritius, thus abandoning the strictness of the colour ban, and rendering it illogical. Further, the Government did not face the necessity of undertaking to secure adequate lands for the natives, and it was notorious that no Union Parliament would in fact provide sufficient lands, nor was it really seriously minded to dispense with all native help. The plan suggested, therefore, merely assumed the form of a method of keeping the natives in a permanently inferior position, and of extending to the Cape and Natal the Boer doctrine of the irreducible distinction between native and European, though unkind critics have frequently remarked on the obviously considerable admixture of native blood in men who claim to belong

<sup>1</sup> Descendants of slaves from Java introduced under the Dutch East Indies Co. For their special treatment see the *Asiatics (Cape Malay) Amendment Act*, No. 12 of 1924, differentiating these Asiatics.



to the best European Transvaal stock. Critics also commented on the native taxation policy of the Government, which relieved the north at the expense of the south, and on the whole increased the pressure on the natives to work for Europeans ; on the new protective policy, which hit the natives hard by increasing the price of the indispensable blanket ; and the refusal of the Government to give Crown land free, even in the areas which under their own policy were to be reserved for natives. Moreover, the procedure adopted regarding the Bill smacked of sharp practice. It was agreed by the Prime Minister that the matter after second reading should be referred to a Select Committee, but the expectation that natives would be allowed, as the Transkeian General Council desired to be allowed, to present evidence on the principle was defeated, the pact majority voting that nothing but detail should be dealt with. The Bill passed on third reading by 44 to 31 votes, but happily if ineffectively, was defeated in the Senate, which showed a higher sense of its duty.

General Hertzog then developed a new policy,<sup>1</sup> which he presented as likely to solve all the native issues, one of segregation and of the abolition of the Cape native vote, in return for which the natives in each province would elect two Europeans (in the case of Natal one) to represent them in Parliament. The proposal was received very coldly by Mr. Tielman Roos, leader of the Nationalist majority in the Transvaal, who insisted that the people there would never tolerate natives sending back members to Parliament. General Hertzog, however, professed determination to seek accommodation with the Opposition and native representatives and to evolve an agreed policy. But in 1926, by reintroducing and passing into law by a joint session the Colour Bar Bill, he immediately raised again in an acute form the whole issue, General Smuts protesting that it was clearly intolerable to settle this item except as part of a comprehensive scheme. It must be noted that the consent of the Imperial Government is necessary for the extinction of

<sup>1</sup> Legislation of 1925 dealt with native taxation on a Union basis, imposing a tax of £1 a head on male adults not subject to income tax, divisible between the Treasury and a Native Development Fund in the proportions of 4 to 1. A special tax of 10s. a hut is also imposed, the proceeds to go to Native Councils where these exist ; otherwise to the Native Development Fund.

the Cape franchise, and that there appears no moral justification whatever for assisting the policy of the pact Government.<sup>1</sup>

The policy of the Union is of special interest, because of the repercussion on Rhodesia,<sup>2</sup> where the Government in 1926 announced that it desired to secure from the Imperial Government intimation of willingness to consider the policy of depriving the native of the right, secured to him by s. 43 of the Constitution, to obtain land on the same terms as a European. It is clear that the policy of segregation of the natives in chosen areas has general approval, but it is pleasant to note that Mr. Hadfield, in advocating it, stated on 3 May 1926 that the areas set aside for the natives must be adequate, and that within them there must be a deliberately chosen, carefully devised, and steadily pursued process of education and development. It is at least clear that, if segregation is ever to be justified or successful, it must be based on elementary justice.

The Imperial Government is inevitably interested in the progress of affairs in the Union, because it has the responsibility of deciding whether it shall hand over control of Bechuanaland, Swaziland, and Basutoland to the Union. If the policy of the Union is dictated merely by regard for European interests, surrender of these territories, which would be wholly against the will of the people, would be a discreditable breach of faith, for there is no doubt that the territories accepted direct rule of the Crown<sup>3</sup> and would never consent to transfer to the control of the Union Ministry. The elaborate schedule to the *South Africa Act* is sufficient proof of the distrust of the Union Government felt by the Imperial Government in 1909, for it prescribes rules which are intended to secure just government. The plan is that of a permanent Commission of not less than three members to advise the Prime Minister, with the right of appeal

<sup>1</sup> The modern practice of permitting exploitation of the natives of Kenya (see Norman Leys, *Kenya*) exhibits an Imperial attitude in painful contrast with that of Mr. J. Chamberlain, who was ready to protect the natives against Mr. Rhodes (B. Williams, *Rhodes*, p. 259).

<sup>2</sup> For the pre-responsible government history see *Parl. Pap.*, Cd. 8674 (1917); Cmd. 547 (1920); Egerton, *British Colonial Policy in the XXth Century*, pp. 181 ff.

<sup>3</sup> Compare the case of the Indian Princes whose relations are with the Crown, and who cannot properly be handed over to the control of the Indian Legislature save by consent.

to the Governor-General in Council, which, of course, is worth nothing, and with the possibility of demanding publication of papers, unless ruled inexpedient by the same authority, which would be still less valuable. Legislation would be by proclamation, liable to disallowance by the Crown and to disapproval by resolutions of both Houses of Parliament. The land of the natives in Basutoland and the reserves in Bechuanaland would be inalienable, while the introduction of liquor would be prohibited. Intercourse as to trade and commerce and locomotion would be free, subject to the pass laws—a very serious qualification—with the rest of the Union. Revenue arrangements would secure that the territories were supported by themselves, and could only be required to make comparatively slight contributions to defence or other cost. Any Bill of the Parliament<sup>1</sup> altering the schedule would require to be reserved. It is plain that, if acted on strictly, the taking over of the territories on these terms would have little attraction for any Union Government.<sup>2</sup>

<sup>1</sup> Apparently this is meant, though it is open to doubt whether it is intended that otherwise Parliament shall have any power over the territory. Cf. *House of Lords Debates*, ii. 764 f. with *Commons Debates*, ix. 1636 f.; Walker, *Lord de Villiers*, p. 459.

<sup>2</sup> Rhodesia has claims on Eastern Bechuanaland.

## IV

# THE IMMIGRATION AND TREATMENT OF COLOURED RACES

### § 1. *Chinese Immigration*

OF the many complex issues presented by the question of the immigration and treatment of Asiatic races in the Dominions the least complex is that of Chinese. This arises from no vital distinction in the character of the problem, but because Chinese subjects have never had any treaty rights of landing on British territory, neither the treaty of Nankin of 1842, nor that of Peking in 1860 conceding such a right,<sup>1</sup> and China has never possessed sufficient power to compel respect to be paid to her dignity.

The first series of anti-Chinese measures began with the gold rush in Victoria in 1854. In 1855 Victoria started a type of legislation (No. 39) which was often copied, the imposition of a limitation of Chinese admissible to one per ten tons of the ship by which he came, and the levying of a poll tax of £10. This was repealed in 1865 (No. 259) when the emergency was over; South Australia, which had been used after 1855 as a route to Victoria, legislated in 1857 (No. 3), but withdrew the Act in 1861 (No. 14). New South Wales, on the other hand, legislated then in Act No. 3, but this also was repealed in 1867 (No. 8). Queensland began in 1876, by seeking to exact heavier mining and trading taxes from Chinese; this was reserved and not assented to, but it was allowed in 1877 (No. 8) to impose £10 poll tax, and in 1878 (No. 8) to forbid Asiatics or Africans to work on a goldfield for three years after proclamation, unless they were the finders. The return of Chinese was also promoted by refunding the entrance money if they went back within three years. In 1880-1 a Conference of the Colonies at Melbourne resulted in decisions to take further steps; there had appeared a considerable number of Chinese in the north-east; there was jealousy of competition and fear of smallpox and leprosy; while a large influx might be expected because the United States had closed the Pacific coast to Chinese. It is probable indeed that some 40,000 Chinese were then in Australia, the

<sup>1</sup> See *Parl. Pap.*, C. 5374; *contra*, C. 5448, p. 57.

maximum reached. Legislation was passed in New South Wales (No. 11), Victoria (No. 723), South Australia (No. 213), and even New Zealand (No. 47) in 1881, imposing limitation of numbers by tonnage and a poll tax, New South Wales and Victoria raising the proportion to one in 100 tons. Queensland in 1884 (No. 13) made the poll tax £30, the tonnage fifty, while a small influx to the goldfields in Tasmania produced her first Act in 1887 (No. 9), on the Victorian model, while Victoria added factory legislation discriminating against Chinese (No. 961). Western Australia<sup>1</sup> in shortage of immigrants tried Chinese immigration, despite the protests of the adjacent Colonies; then in 1884 the *Imported Labourers Registry Act*, No. 25, aimed at a regular system of indentures. In 1886, however, Asiatic or African aliens were debarred for five years from holding miners' rights on a goldfield, and Act No. 13 imposed a £10 poll tax and allowed only one Chinese to fifty tons.

In 1887<sup>2</sup> the Chinese Minister in London made representations to the British Government, which addressed the Governors on the subject, and in 1888 a panic arose in Australia because it was believed that large numbers of Chinese were entering the Northern Territory, as a result of railway construction there. South Australia was induced to follow the ordinary model of restriction, and New South Wales and Victoria began to refuse entrance to Chinese, the legality of the action being affirmed by the Privy Council on the ground that an alien had no right to enter British territory which he could enforce by action.<sup>3</sup> New South Wales<sup>4</sup> then enacted a poll tax of £100, and restricted arrivals to one to 300 tons. In June a Conference met at Sydney, where it was agreed to adopt the principle of no poll tax and one to 500 tons, New South Wales promising to amend her legislation if two other Colonies accepted the new scheme, on this footing her Bill was allowed effect. Victoria and South Australia in 1888, Western Australia in 1889 followed suit, with an exception in this case for indentured Chinese under the

<sup>1</sup> Cf. Battye, *Western Australia*, pp. 318 f.    <sup>2</sup> *Parl. Pap.*, C. 5448, pp. 1 f.

<sup>3</sup> *Musgrove v. Chun Teeong Toy*, [1891] A. C. 272, overruling 14 V. L. R. 349. It is followed in the Cape (e. g. 14 C. T. R. 24; 20 C. T. R. 684). See *Poll v. Lord Advocate* (1907), 1 F. 823.

<sup>4</sup> Cf. Parkes, *Fifty Years of Australian History*, ii. 204–31; Dilke, *Problems of Greater Britain*, i. 146 f.

Act of 1884; in 1893, having attained self-government, she adopted the policy of the other Colonies, but in 1897 (No. 27) admitted indentured Chinese to north of 27° S. lat. Queensland legislated in 1888, but as the Bill went beyond the other Colonies it was only allowed in 1889 (No. 22) on promise of amendment carried out in 1890 (No. 29) but not very satisfactorily. The feeling which had hitherto been mainly concerned with avoiding evil results from the congregation of natives, had gradually hardened into one of determination to keep Australia 'white', and the advent of the Commonwealth was marked in 1901 by the adoption in the *Immigration Restriction Act* of the dictation test, which requires any immigrant on demand to write a passage of fifty words in a European language chosen for him; in fact it can be made a courteous mode of complete exclusion. The enforcement of this rule is facilitated by the imposition on the captains of ships entering Australian harbours of a fine of £100 for each Chinese who succeeds in entering Australia illegally. The population is steadily diminishing; in 1921 it stood at but 17,157, with 3,655 half-castes. They are liable, of course, to all disabilities incumbent on Asiatics generally, such as exclusion from the sugar and banana industries in Queensland, but they are also the special subjects of attention in Western Australian and other Factory Acts, which are aimed at the competition of Chinese laundries.

New Zealand in 1896, as a result of the slight increase in arrival over departures, increased the poll tax to £100 and limited entry to one per 200 tons burden. In 1907 this was found inadequate, and an Act (No. 79) required any would-be Chinese immigrant to read 100 words of English; modifications were made in 1908 (No. 230) and 1910 (No. 16), but the principle was maintained, and an appeal from the Chinese of the Dominion to the Secretary of State was necessarily answered by insistence that the matter was one for the local Government.<sup>1</sup> In 1910 an Act (No. 67) regarding factories was in fact, but not in form, aimed at Chinese laundries. In 1920 finally the *Immigration Restriction Amendment Act* adopted the principle of permitting the entry of none save British subjects by birth without permits, while for this purpose naturalized British subjects and natives of British

<sup>1</sup> *Parl. Pap.*, 1908, A. 1, pp. 15, 19; 1909, A. 2, p. 7; *Parl. Deb.*, 1907, cxlii. 838 ff., 923 ff., 961 ff.

dominions, colonies, or protectorates are not reckoned as British subjects by birth. The number of Chinese who can be admitted is thus susceptible of regulation, and in 1921 the total was only 3,266, of whom 156 were half-castes.

In Canada, British Columbia began in 1878 her long career of attacks on Asiatics, who were naturally attracted thither by the suitability of climate, relative proximity, and closeness to the United States coast. It imposed (c. 35) a quarterly licence tax of ten dollars on Chinese, but in *Tai Sing v. Maguire*<sup>1</sup> this was held invalid, though the grounds alleged, treaty rights, Dominion control of commerce and of aliens, were, save in the last point, of dubious validity. In 1884 three Acts (cc. 2-4) were passed; the first, forbidding immigration, was disallowed by the Dominion as perhaps of Imperial interest, though Lord Derby<sup>2</sup> disclaimed this; the other two prevented them obtaining Crown lands, and imposed again a special tax, which was pronounced again invalid as discriminatory and not a genuine use of the taxing power.<sup>3</sup> The Dominion, however, moved, imposed a fifty dollar head tax, and restricted entries to one to fifty tons.<sup>4</sup> The poll tax was raised to 100 dollars in 1900 (c. 32). Further complaints of immigration were investigated by a Commission in 1902, which resulted in an Act (c. 8) of 1903 increasing the tax to 500 dollars, despite Chinese protests.<sup>5</sup> In 1908 concessions were made (c. 14) to *bona fide* students and others, while in 1911 proof of good faith was required from merchants seeking temporary entry. In 1923 (c. 38) the pressure of British Columbia<sup>6</sup> brought about the passing of the *Chinese Immigration Act*, which definitely restricts Chinese immigration to officials, merchants—to be defined by regulation—and their wives, students, and children born in Canada, some minor changes in the original Bill being made in the Senate to meet the representations of the Chinese Consul-General.<sup>7</sup> In British

<sup>1</sup> 1 B. C. (Irving) 101; Lefroy, *Leg. Power in Canada*, pp. 254-9; *Prov. Leg.*, 1867-95, pp. 1011, 1052, 1063.

<sup>2</sup> 31 May 1884; *British Columbia Sess. Pap.*, 1885, p. 464.

<sup>3</sup> *R. v. Wing Chong*, 1 B. C. (part ii) 150.

<sup>4</sup> 48 & 49 Vict. c. 7; *Sess. Pap.*, 1883, No. 93.

<sup>5</sup> *Sess. Pap.*, 1902, No. 54. See above, Part III, chap. i, § 4.

<sup>6</sup> Act 1922, c. 25, is aimed at Chinese launderers.

<sup>7</sup> Merchants and students must have Chinese passports viséd by a Canadian official.

Columbia, as has been seen, there have been conflicting decisions as to the right of the Chinese to earn a living as compared with the legislative power of the province over its own property, while Saskatchewan has successfully prohibited the employment of white women by Chinese.

In the Transvaal under Lord Milner's influence a system of importation of Chinese labourers under semi-servile conditions<sup>1</sup> ended in the defeat of the Government of Mr. Balfour which was responsible for sanctioning it, and the responsible government of the Transvaal hastily furthered its termination. The step was taken in face of the strong dislike of the Australian Commonwealth, New Zealand, and the Cape, which legislated in 1904 (No. 37) and 1906 (No. 15) against further Chinese immigration, save as regards British subjects, and Newfoundland in 1906 (c. 2) and 1907 (c. 14) expressed its solidarity of sentiment by similar legislation. The treatment of the Chinese, while detained as prisoners in locations, unfortunately remains as a standing source of discredit to both the local and Imperial Governments, and in special to Mr. A. Lyttelton. The policy was the more inexcusable as no local or Imperial interest could be said to be served by the quicker exhaustion of the gold on the Rand, but at this time policy in South Africa was fatally influenced by financial houses.

## § 2. *British Indian and Japanese Immigration into Australasia*

The rules which have been applied to Chinese, and which may in due course require revision, if the potential power of that country is ever consolidated, could not be applied either to British Indians, because the Imperial Government recognized that British nationality could not be ignored, or to Japanese, because for many years British policy aimed at, and may have again to seek, support from Japan against the Russian advance in the East. The issue<sup>2</sup> became urgent in 1896, when a

<sup>1</sup> *Parl. Pap.*, Cd. 1895, 1898, 1899, 1941, 1945, 1986, 2025, 2026, 2105, 2183 (1904); 2401 (1905); 2786, 2788, 2819, 3025; H. C. 114, 156 (1906); 3328, 3405 (1907); 3994 (1908); Walker, *Lord de Villiers*, pp. 412, 417 ff., 429.

<sup>2</sup> Reeves, *State Experiments in Australia and New Zealand*, ii. 325-64; Commonwealth *Parl. Deb.*, 1901-2, pp. 3497 ff.; *Parl. Pap.* 1901-2, Nos. 2, 33, A. 15, 18; South Australia *Parl. Pap.*, 1896, No. 38; Quick and Garran, *Const. of Commonwealth*, pp. 623 ff.



Conference at Sydney, at which Western Australia alone was unrepresented, decided to include all Asiatics in the scope of their anti-Chinese measures. Bills were passed, but reserved, in New South Wales, South Australia, Tasmania, which exempted British subjects, and New Zealand, which exempted British Indians. The matter was discussed at the Colonial Conference of 1897, when Mr. Chamberlain<sup>1</sup> admitted that the Colonies were entitled to keep themselves free from being overpowered by men of different civilization, race, customs, but wholly objected to *nominatim* discrimination, insisting on the might, the high culture, the traditions of India, and asking that exclusion should be based on some definite cause which could be specified in an Act, instancing as satisfactory the Natal Act No. 1 of 1897, which adopted as a means of discrimination the test of writing an application for admission in a European language, and forbade entry to paupers, criminals, diseased persons, idiots, and prostitutes. Moreover, in a dispatch of 20 October 1897<sup>2</sup> Mr. Chamberlain informed the Australian Colonies that the Japanese Minister had indicated that Japan would not take exception to the use of a language test as a means of exclusion, and he suggested that a similar device might be used against Indians. Western Australia followed these lines in 1897 (No. 13). New South Wales legislated in 1898 (No. 3), Tasmania in the same year (No. 69), and New Zealand in 1899 (No. 33). The situation for the Commonwealth was disposed of by the *Immigration Restriction Act*, 1901, which adopted a dictation test, which officially is admitted to be a method of excluding any person whatsoever at pleasure. On the other hand, in 1904 an informal agreement was made with India<sup>3</sup> in order to secure that merchants, students, and other temporary visitors might be allowed to enter without difficulty, and, though the Act has required amendment from time to time to secure the keeping out of Chinese, it has worked admirably from the Commonwealth point of view to control immigration. Moreover, the racial aspect has been considerably modified by the proof given by the Commonwealth in the *Immigration Act*, 1925, that the policy of the Government is

<sup>1</sup> *Parl. Pap.*, C. 8596, p. 12. See also H. C. 393 ; Sess. 2, 1900.

<sup>2</sup> Commonwealth *Parl. Pap.*, 1901, No. 41.

<sup>3</sup> Commonwealth *Parl. Pap.*, 1905, No. 61.

generically based on securing one type in Australia. The Act enables the Governor-General to forbid, either wholly or subject to numerical limitation, the entry of any nationality, race, or occupation if he is satisfied that such entry is rendered undesirable by reason of economic, industrial, or other conditions in the Commonwealth, or that the persons specified are unsuitable for admission, or that they are unlikely soon to be assimilated. The Act was motivated by what was deemed excessive Italian immigration and the determination of the immigrants to maintain racial separation. Assurances were given that arrangements had been made with the Government of Italy to restrict, as desired by the Commonwealth, the number of Italian immigrants. Moreover, in the same year the Commonwealth honoured her acceptance at the Imperial Conferences of 1921<sup>1</sup> and 1923<sup>2</sup> of the doctrine of the right of Indians lawfully resident in the Dominions to be treated as ordinary citizens, by passing an Act to give the Commonwealth franchise to natives of British India, being inhabitants of Australia and resident at least six months.

Unfortunately the concern of Australia did not stop at the matter of real importance, the demand for racial purity and the absence of economic competition from persons with a lower standard of life. Like all sentiments, it spread beyond its proper basis and turned into a dislike of things oriental, resting on a somewhat imaginary superiority, and thus, in the *Post and Telegraph Act*, 1901, No. 12,<sup>3</sup> the Government was forbidden to enter into any mail contract with ships not manned with white labour. This necessarily terminated the connexion of the British and Australian Governments in the arrangements for the service, for, as Mr. Chamberlain<sup>4</sup> in a specially effective dispatch of 17 April 1903 pointed out, the differentiation was purely racial, referring as it did to a service to be carried out largely in tropical or subtropical waters; it had been for many years in operation, and the Crown, by the Mutiny Proclamation of 1858, had declared itself bound to the natives of its Indian

<sup>1</sup> *Parl. Pap.*, Cmd. 1474.

<sup>2</sup> *Ibid.*, Cmd. 1987.

<sup>3</sup> *Parl. Pap.*, Cd. 1639, pp. 4, 5; Commonwealth *Parl. Pap.*, 1903, Nos. 21, 40.

<sup>4</sup> No subsequent Secretary of State save Lord Crewe showed any sincere interest in the Indian claims, and Lord Crewe lacked the force and character of Mr. Chamberlain.

territories by the same obligations of duty which bound it to all its other subjects, and it undertook faithfully and conscientiously to fulfil these obligations. A similar difficulty arose in 1906<sup>1</sup> when Mr. Deakin proposed to limit the preference he wished to grant to British goods to those imported in British ships manned by white labour. The Bill would have placed on the Imperial Government the distasteful duty—which it was ready to fulfil—of declining a preference on such terms, but happily, by its limitation to British ships, it ran counter to the treaties then in force with Austro-Hungary and Russia, and the Commonwealth Government was willing to agree to the Bill being reserved, when it was allowed to lapse, the new preferential proposals in 1907 avoiding any such restriction as proposed the year before.

In 1904 a similar informal arrangement with Japan permitted temporary visits from Japanese students, merchants, tourists, &c., but in 1908 at the request of the Commonwealth Government steps were taken to terminate the obligations of the Commonwealth in respect of Queensland<sup>2</sup> under the Anglo-Japanese commercial treaty of 1894 which had been accepted in 1897, subject to a special protocol allowing the entry of Japanese of the labouring classes to be stopped by the Colony. In 1900 the Queensland Parliament had legislated to penalize Asiatics in respect of the *Sugar Works Guarantee Acts*, 1893–5, but the Bill was refused assent, on protests being made by Japan that the measure was a differentiation contrary to her rights under the treaty. In Act No. 13 of 1904 Queensland imposed disabilities on Asiatics as regards obtaining agricultural advances, but rendered this less offensive to Japan by extending it to all aliens by Act No. 15 of 1905, and in Act No. 1 it deprived all Asiatics of the franchise which hitherto they had had for the Assembly if they had a freehold qualification.<sup>3</sup> A less offensive form of treatment was adopted in Acts No. 18 of 1904 and No. 9 of 1910, where the language test was adopted as a mode of exclusion, though it may be admitted that a certain absurdity

<sup>1</sup> *Parl. Pap.*, 1907, No. 3; *Deb.*, 1906, pp. 3709 ff., 3760 ff., 3866 ff., 5051 ff., 5288 ff., 6140 ff., 6370 ff., 6393 ff., 6408 ff. See also *Parl. Pap.*, Cd. 3523, p. 315.

<sup>2</sup> *Queensland Parl. Pap.*, 1899, A. 5.

<sup>3</sup> See also 51 Vict. No. 11, s. 7; 56 Vict. No. 11, s. 43; 61 Vict. No. 25, s. 85; 62 Vict. No. 24.

appears when the dictation test is applied to fitness for work in a margarine factory. In 1912-13 by arrangements made between the Commonwealth and Queensland the participation of Asiatics in the sugar industry, which is highly subsidized in effect by the Commonwealth, was excluded.<sup>1</sup> Similarly the *Banana Industry Preservation Act*, 1921, No. 3, is designed to prevent Asiatics having any share in it. As regards the pearl shelling industry which is carried on in Queensland, Western Australia, and Northern Territory waters largely by Japanese, it was proposed at one time to oust them and substitute white labour, but the Commission of 1912 in its final report in 1916 quite frankly admitted that the retention of the Japanese would do no harm to the general policy of exclusion and that it was not wise to persist in the plan of granting no further licences to allow the admission of the Japanese.

Of the other States Western Australia has been most energetic in anti-Asiatic measures ; thus the *Factories Act*, 1904, No. 22,<sup>2</sup> the *Mining Act*, 1904, and the *Early Closing Act Amendment Act*, 1904, all contained discriminations by name which elicited some comment from the Imperial Government, but without producing more than abuse of that Government in the Assembly. Act No. 27 of 1907 deprived Asiatics of the Assembly franchise, which had been exercised on a freehold qualification. In 1909, however, the Upper House declined to pass a Fisheries Bill which penalized Asiatics, and in 1910, when a Bill to prohibit marriages between Europeans and Asiatics was produced, feeling was not in favour of it, and it was allowed to drop. The *Factories and Shops Act*, 1920, No. 44, which is largely a re-enactment of old measures, shows the nature of the treatment meted out to Asiatics ; a factory ordinarily requires four or more workers to fall under regulation, but a less number is sufficient if they be Asiatics ; no Asiatic can be registered as owner or occupier, unless he carried on the business there before 1 November 1903, nor be employed there save under the same condition ; no Asiatic can work longer hours than a woman, or before 8 a.m. or after 5 p.m. All

<sup>1</sup> Queensland Act No. 4 of 1913 ; Commonwealth Nos. 25 and 26 of 1912 ; *Parl. Pap.*, Cd. 6863, p. 113 ; *Baird v. Magripilis*, 37 C. L. R. 321.

<sup>2</sup> A proposal to amend elicited violent attacks on the British Government ; *Parl. Deb.*, xxvii. 98 ff.

furniture imported or manufactured in the State must be legibly stamped 'European labour' or 'Asiatic labour' as the case may be. The propriety of these anti-Asiatic clauses is far from obvious. South Australia in the period 1901-6<sup>1</sup> fell under the same spell of anti-Asiatic legislation, but there is less exception to the rule laid down in 1910 for the Northern Territory, which forbade an Asiatic employing an aborigine, and if the law refused votes in the Northern Territory to immigrant Asiatics, that was not the case with those born there. In 1908 the Upper House of Victoria dealt firmly with efforts to penalize Asiatics in a Factories Bill, and in the next year the Government of New South Wales, by the free use of the name of the Imperial Government, succeeded in securing the restriction to Chinese of factory disabilities. Moreover, in its pensions legislation, No. 17 of 1908, the Commonwealth refused to penalize Australian Asiatics, though excluding Africans and other Asiatics from its benevolence, and there is a good deal to be said for its Act No. 26 of 1910, which prohibits export of children for exhibition purposes to Asiatic countries without security for their welfare.

In 1907 New Zealand made an effort to penalize Asiatics in a factory measure, but this was given up in order to avoid the necessity of reservation. In 1910<sup>2</sup> a still more vehement anti-Asiatic effort was passed by both Houses. It was aimed at the unfortunate lascars, and it proposed to exact on the bills of lading and passenger tickets issued for trade from the Dominion to Australia a surtax of 25 per cent., unless these vessels complied with New Zealand conditions as to coastal trade with respect to the pay and accommodation of the crew. The measure was never allowed, after a discussion of the issue at the Imperial Conference of 1911, and there seems little doubt that it was unwisely passed and that the Government was willing to allow it to lapse. In 1913 the agitation for further restrictions on immigration revived, without, it seems, much ground, but in 1920 it was alleged that Indians had learned to come from Fiji, having acquired in that Colony sufficient knowledge of English to enable them to pass the dictation test. There was then passed the *Immigration Restriction Amendment*

<sup>1</sup> Act No. 763, s. 3; No. 837, ss. 19, 21, 50; No. 890, s. 5.

<sup>2</sup> *Parl. Pap.*, Cd. 5745, pp. 395 ff.

*Act*, 1920, No. 23, which allowed free entry to European British subjects, but in every other case required application in writing from the place of abode of any person desiring to become a permanent settler, as opposed to a mere temporary visitor for business, health, or pleasure purposes. The Act is frankly discourteous to Asiatics, but nothing short seems to have been possible in view of the highly excitable condition of local feeling.<sup>1</sup>

The effect on the Commonwealth and the Dominion of the resolutions of the Imperial Conferences of 1921 and 1923 in favour of the removal of restrictions from Indians lawfully domiciled in the Dominions has been seen, as noted, in the case of the Commonwealth franchise ;<sup>2</sup> it remains to be seen how much effect it will have in the States and in New Zealand.

### § 3. *British Indians and Japanese in Canada*

The centre of trouble in Canada has been British Columbia.<sup>3</sup> In 1897 it passed an anti-Japanese Bill, which was reserved and never assented to. In 1898 it inserted in a number of private Acts clauses forbidding the employment of Japanese or Chinese under a fine of four dollars per head per day, and its *Labour Regulation Act* (c. 28) and *Tramway Incorporation Act* (c. 44) were deliberately aimed at the Japanese. On the protest of the Japanese Government the Imperial Government asked for, and attained, the disallowance of the two public Acts on the score, not that it desired to secure Japanese immigration, but that *nominatim* discrimination was improper. In 1899 were disallowed a *Liquor Licences Act* (c. 39) and *Coal Mines Regulation Act* (c. 46), which attacked Japanese and the first Indians also. In 1900 it passed an *Immigration Act* (c. 11) on the Natal model, and a *Labour Regulation Act* (c. 14) also using a language test ; both of these were disallowed, but it was not thought necessary to disallow the *Liquor Licences*

<sup>1</sup> Keith, *War Government of the Dominions*, pp. 322 ff. The total of Indians in 1924 was 640 !

<sup>2</sup> Similarly in Aug. 1926 the *Invalid and Old Age Pensions Act*, 1908-25, and the *Maternity Allowance Act*, 1912, were amended to extend their benefits to British Indians born in India, if resident in Australia.

<sup>3</sup> Canada *Sess. Pap.*, 1900, No. 87 ; *Prov. Leg.*, 1896-8, p. 77 ; 1899-1900, pp. 104, 124 ff. ; 1901-3, pp. 80, 88 ; 1904-6, pp. 130, 137, 150.

*Act* (c. 18) or the *Vancouver Incorporation Act* (c. 54), as the differentiations seemed of minor account, though addressed both to Indians and Mongols, the municipal franchise being denied. In 1902 (cc. 34, 38, and 48) and 1903 (cc. 12, 14, and 17) Acts as to immigration, labour regulation, and coal mine regulation were disallowed, the Royal Commission of 1902 protesting against penalizing Japanese as from 1 August 1900 on the score that Japan had limited emigration to British Columbia. If legislation were essential, it should be on the Natal model. In 1904 another *Immigration Act* (c. 26) was disallowed, and in 1905 the same trio as in 1902 and 1903 met the same fate (cc. 28, 30, and 36).

In 1906 the Dominion Government, despite the fact that the position had been clearly pointed out by the Imperial Government, adhered without reservation to the Anglo-Japanese commercial treaty under which, in effect, free entry of Japanese was provided for.<sup>1</sup> All went well until 1907 when, as a result of inducements offered by steamship companies and of Portuguese competition in Hawaii, there was a considerable influx of Japanese, whose presence resulted in a discreditable riot at Vancouver in September.<sup>2</sup> The Dominion Government saw to making good the losses suffered, but it was necessary to prevent the recurrence of the position, and Mr. Lemieux was sent to negotiate in Japan with the aid of the British Ambassador a treaty arrangement which might avoid any formal action. This was accomplished in January 1908 by an understanding that those Japanese alone could be admitted to Canada who came with due authority from the Japanese Government, while Japan undertook that the number of new immigrants would not exceed 400 a year. In the same year another effort (c. 23) on the part of British Columbia to legislate as to immigration was disallowed, but not before the legislation had been pronounced illegitimate both as regards Japanese and as regards British Indians. These had begun in 1906 to enter in considerable numbers from Hong-Kong, and Mr. Mackenzie King,<sup>3</sup> who was sent in 1908 to negotiate with the Indian Government,

<sup>1</sup> *Canadian Annual Review*, 1907, pp. 382-98; 6 & 7 Edw. VII, c. 50; *In re Nakane*, 13 B. C. 370; *In re Narain Singh*, 477.

<sup>2</sup> *Commons Deb.*, 1907-8, pp. 694 ff., 2025 ff.; *Parl. Pap.*, Cd. 4118; 9 & 10 Edw. VII, c. 27, ss. 37, 38.

<sup>3</sup> Skelton, *Sir Wilfrid Laurier*, ii. 351-5.

found that that body was not prepared to adopt the position of Japan, and to take steps to limit emigration from her shores by any restrictive legislation. The Dominion Government, therefore, had to fall back on its powers and to impose, first, the requirement of possession on entry of twenty-five (later 200) dollars, and, second, the condition that any Asiatic immigrant, like others, must come from his place of origin on a through ticket purchased in advance and by a continuous journey. Finally, to avoid all difficulties it was laid down in 1913 that no skilled or unskilled labourer might enter Canada *via* British Columbia for periods which were indeed temporary but operated consecutively. In order to test the law, and to excite feeling in India, revolutionary plotters there devised the plan of hiring the *Komagata Maru* and sending her from Hong-Kong with a miscellaneous body of passengers, some acting in good faith, some certainly not. The law was enforced justly and with discretion by Canada, relying on the presence of H.M.C.S. *Rainbow*; it admitted those of Canadian domicile, and refused the others permission to land, reprovisioning the ship for her return voyage; the ugly character of the agitation in Canada itself was seen in the brutal murder in open court of Mr. Hopkinson, an agent of the Indian and Dominion Governments in an effort to promote the interests of the peaceful section of the Indians. The subsequent history of the would-be emigrants in the ship on the return to India showed them to be deliberate revolutionaries aiming at the destruction of British rule; and unquestionably the Indians in Canada suffered from their association in origin with these malcontents and malefactors. It is fair to say that indignation in India had been aroused by deliberate assertions that Mr. Rogers, one of the leading spirits of the Borden Government, had given assurances that Indians would be allowed to bring their wives and children in those cases where they had legitimately entered and had intended to send for their families, and that such assurances had been deliberately violated.<sup>1</sup> It is clear that there was some misunderstanding, and more ill faith, but some annoyance was natural at the fact that the most Canada was prepared to do was to waive the requirement of the possession of 200 dollars, if a wife could comply with the rule as to coming

<sup>1</sup> Keith, *Imperial Unity and the Dominions*, pp. 195-7.



by a continuous voyage. Moreover, the differential treatment of the Japanese under the arrangements entered into in 1911 and 1913 regarding the application to the Dominion of the Anglo-Japanese treaty of 1911 was a source of natural irritation, since the favoured classes who could be included in the number of 400 included the families and servants of resident Japanese. The matter was complicated by the services of India and Japan in the War, which rendered it important to govern the matter by considerations higher than mere expediency.

The Imperial Conferences of 1917<sup>1</sup> and 1918<sup>2</sup> pronounced definitely in favour of the principle that Indians lawfully resident should be treated on a suitable basis, while fresh immigration must be determined as felt best by the Dominions, subject to the rule that visits of a temporary kind for business or pleasure, as opposed to labour, or for education, should be freely encouraged and regulated by a system of permits which might, if desired, be viséd by a Dominion officer in the country of domicile, and resident Indians should be permitted to bring in one legitimate wife and children duly certified as such by authority of the Governor-General. As to this neither Australia nor New Zealand raised any objection, asserting that it was covered by their laws, while Canada, which had exempted British Indians from compulsory military service by an Order in Council of 12 June 1918, now by Order of 26 March 1919 permitted the Sikhs to bring in their wives and children, though it was pointed out that many of them had no desire to become permanent settlers, but were merely seeking to make some money before returning to India. But, despite the suggestion of Mr. Mackenzie King, the Franchise Act of the next year was worded so as to deny the federal franchise to any person disfranchised for the local Assembly, thus taking away the possibility of Indians voting in British Columbia,<sup>3</sup> though those who had served in the War were treated as entitled to it. The matter was not carried much further by the Conferences of 1921<sup>4</sup> and 1923.<sup>5</sup> Mr. King at the latter was non-committal, declining to undertake to override British Columbian feeling

<sup>1</sup> *Parl. Pap.*, Cd. 8566, p. 120.

<sup>2</sup> *Ibid.*, Cd. 9179, p. 195.

<sup>3</sup> *Cunningham v. Tomey Homma*, [1903] A. C. 151, proves the legality of exclusion. Cf. *Parl. Pap.*, Cd. 5745, pp. 407 ff., Cd. 5746-1, pp. 279-81.

<sup>4</sup> *Parl. Pap.*, Cmd. 1474, p. 8.

<sup>5</sup> *Ibid.*, Cmd. 1987, pp. 17 ff.

as to the franchise, an attitude disappointing in itself in view of his position when in opposition, but explained by the extreme weakness of his political majority. He was, however, able to give assurances of his anxiety to co-operate with the Indian Government. He had already expressed the same views to Srinivasa Sastri, when he toured in 1922 the Dominions in order to promote the carrying out of the principle of fair treatment of all lawful residents, and again on 29 June 1923, when the matter was raised in Parliament. His view was that it was contrary to the constitution that one province should be overridden by others, and this is perfectly sound, subject to the observation that provinces are regularly overridden<sup>1</sup> when it seems better to the Dominion Government to take such a step, and it may be doubted if any great harm could happen to British Columbia if a few hundreds or thousands of Indians could vote for federal elections.<sup>2</sup>

Japan with the protection of her treaty rights aided India in 1912, when Saskatchewan passed an irritating law to prevent any Oriental from employing a white woman even as a stenographer. This was replaced in 1913 by restricting the measure to Chinese, while Manitoba did not bring an Act of 1913 on the same topic into force. The numbers of Japanese entering Canada undoubtedly somewhat increased in the war period; employers wanted them for agricultural work, for domestic service, and for laundries, and in 1920 there was a distinct recrudescence of ill-feeling. Fortunately, nothing was done contrary to treaty, but the feeling of doubt was one of the factors which aided Canada to work for the merger of the alliance of 1911 in the wide policy of the Washington Treaties of 1921-2. Further, in 1924, after prolonged discussions, Japan was able to concede a point by undertaking that the number of Japanese entering under the style of domestic servants for families resident in Canada and agricultural workers would not exceed 150<sup>3</sup> a year as opposed to the former 400, though even this sensible arrangement was not sufficient in the eyes of

<sup>1</sup> Cf. Mr. King's fatal effort to coerce Alberta on the school issue in 1926 at the bidding of Quebec.

<sup>2</sup> For the bitterness of British Columbian feeling see *Canadian Annual Review*, 1922, pp. 830 ff.; 1924-5, p. 452.

<sup>3</sup> Mr. King, House of Commons, 19 March 1924.

British Columbia. The Privy Council, however, has eased the position by affirming effectively the supremacy of the Canadian legislation approving the Japanese treaty over any British Columbia Act, and it will very possibly pronounce invalid any provincial legislation definitely aimed at expelling, by refusing possibility of work to, Japanese or other Orientals, while the Dominion power of disallowance would have to be used in case of necessity.

#### § 4. *The Asiatic Question in South Africa*

The Asiatic question in South Africa has been greatly embittered and rendered more serious by events since the federation of the Colonies, though it existed in a distinct form before that date.

In the Cape Indian immigration raised no difficulties and created no anxiety, and it was not until 1902 that an Act (No. 47) was passed to adopt to the Colony the principle accepted in Natal in 1897 by imposing a dictation test in a European language. Yiddish was to be ranked in this Order by an Act, No. 30 of 1906, which assisted the admission of a low class of Jewish population, certainly not superior to the British Indian. Otherwise, however, the Indians remained undisturbed under the just and humane laws of the Colony.

Matters went far otherwise in Natal,<sup>1</sup> which had been built up largely by Indian labour which supplied the deficiency of native workers and the reluctance or inability of the South African white man—save some of the descendants of German settlers—themselves to do honest manual labour. Racial superiority has regarded the masses of natives with indifference; the spectacle of the indentured Indians settling on the land and making themselves happy homes, while rising slowly but surely in culture and wealth, excited jealous indignation, and induced the population of the territory—whose conduct in regard to natives and Indians alike proclaimed the folly of granting them charge of other men's interests—to enter on its course of seeking by law to depress those whose industry and energy reflected on themselves. No serious harm was done by the carrying further of immigration restriction by Acts No. 30 of 1903 and No. 6 of 1906. But Act No. 18 of 1897 aimed a blow at Indian merchants

<sup>1</sup> The *Immigration Restriction Act*, No. 1 of 1897, was amended by No. 30 of 1903; No. 3 of 1906.

by providing that merchants should only hold licences if they could keep accounts in England, a rule extended by interpretation to mean that they must be able to do so personally. Indians had already by Act No. 8 of 1896 been deprived of the franchise for Parliament on the specious score that they were members of a race who had not Parliamentary institutions at home, though it does not appear that Russians fell under exclusion. In 1905 it was proposed to deprive them of the municipal franchise also, but the protests of the Imperial Government were directed both to substance and form, and assent was refused, unless it was amended. In 1908<sup>1</sup> three Bills were promoted : one to prohibit further grant of licences to Indian dealers ; one to terminate within a fixed period the validity of existing licences ; and one to prohibit further Indian immigration. The first two were reserved, and never assented to ; against the third measure a Commission reported in 1909, and the same year saw an Act (No. 22) which gave an Indian, refused a renewal of a trading licence, a right of appeal to the Supreme Court as a safeguard from the jealousy of the rival traders who dominated the municipal bodies which dealt with licences.

The record of the Transvaal is still more deplorable. The South African Republic, partly in order to irritate the British Government, insisted on passing an Act, No. 3 of 1885, which refused to allow any Indian to acquire citizenship ; forbade the ownership of real property ; required those who traded to trade in locations ; and enforced registration, exacting further a fee. The British Government took up the matter energetically, seeing that it clearly contravened the provisions of the London Convention of 1884 ; but an arbitration by the Chief Justice of the Orange Free State in 1895<sup>2</sup> referred the matter to the law courts, which decided in a test case in 1898 that the law authorized the removal of Indians for both residential and business purposes into locations. The rest of the war gave the Imperial Government the power and the duty of making good the contentions which they had bitterly pressed against the Boers, but to the indelible discredit<sup>3</sup> of the Empire Lord Milner proceeded to

<sup>1</sup> *Ass. Deb.*, xliv. 326-72, 455-72, 498-500 ; xlv. 1-5, 61-76, 131-43, 317 ; *Council Deb.*, 1908, pp. 70-6, 84-96, 101-3.

<sup>2</sup> *Parl. Pap.*, C. 7911.

<sup>3</sup> Cf. Egerton, *Brit. Col. Policy in the XXth Century*, p. 176 ; *Parl. Pap.*, Cd. 2239, pp. 4 ff., for the new disabilities.

render the position of the Indians, whose ill-treatment had been adduced *inter alia* as a just *casus belli*, more unsatisfactory. Steps were taken under Peace Preservation legislation to keep out Indians who claimed the right to re-enter the Transvaal—some no doubt without just cause, many doubtless on excellent grounds—and in 1902 Lord Milner actually proposed segregation and registration, which Mr. Chamberlain had the strength of mind to refuse. In 1903 Lord Milner, on the one hand, asked for 10,000 Indians to work on the railways, and to be repatriated, while issuing in April a notice requiring Indians to live and trade in bazaars in each town, though it was stated that Indians of higher education or social standing would be exempted. Worse was to follow. Sir A. Lawley in 1904 actually submitted legislation which would have compelled every Indian to reside in a location and to trade there, unless he was certified to be living in accordance with European ideas; even in that case he would only be permitted to trade in a location, unless he had already established himself outside before the war. All Indians were to be registered and pay a £3 tax. Before these deplorable proposals could be dealt with, the Supreme Court of the Transvaal<sup>1</sup> held that the Act of 1885 really merely regulated residence in locations and had no regard to trading in locations. Mr. Lyttelton, fortunately, was incapable of injustice, despite his lack of force of character and soundness of judgement.<sup>2</sup> He admitted<sup>3</sup> the power to exclude Indians in future, as was being done throughout the Empire, but an apprehended trade competition from a small number of British Indians, who under restriction of immigration must form a diminishing proportion of the population, could not be accepted as justification for the legislation proposed. ‘His Majesty’s Government had steadily declined to allow this fear to influence their views in the past. On the contrary, for many years they repeatedly protested before the Empire and the civilized world against the policy and laws of the late South African Republic in relation to this subject.’ It was contrary to national honour to seek to impose on Indians disabilities which had been the subject of

<sup>1</sup> *Habib Motan v. Transvaal Government*, [1904] T. S. 404; cf. *Essop and others v. R.*, [1909] T. S. 480.

<sup>2</sup> These led him to the fatal error of Chinese labour.

<sup>3</sup> *Parl. Pap.*, Cd. 2239, pp. 44 ff.

protest, and which had been declared by the law courts not even to be in accordance with the law of the country.<sup>1</sup> The Imperial Government then could agree only to provisions to secure the residence on sanitary grounds of Indians in locations and bazaars, and declined to apply any more severe restrictions to newcomers, while it asserted that those who could reside outside locations must be allowed to acquire property in land occupied for business purposes. As the Government had full power of keeping Asiatics out under the general *Peace Preservation Ordinance*, No. 5 of 1903, and as to legislate on the lines indicated would have meant making some concession to Indians as to ownership of property, it did nothing, and Mr. Lyttelton let the matter, *more suo*, slide. The new Government under Lord Elgin and Mr. Churchill made no effort to secure the elementary rights of the Indians before granting responsible government, though, when they were prepared to give that concession, they had every right to make it conditional on the Boers accepting a decent treatment of the Indians as a counterpart to the generosity shown to them. Of the many melancholy pages of British history few are darker than that of Conservative and Liberal Governments alike in their attitude to the question of Indians in the Transvaal, and, while the wisdom and magnanimity of the grant of responsible government to the conquered colonies must justly be recognized, it is deplorable that no room could be found for justice to other British subjects. The responsibility must be shared by the Indian Government, the India Office, and the Colonial Office, all animated, like the Boers, with contemptuous indifference for a race which appeared content to acquiesce in military domination, and by the Indian people, who in their internecine feuds had allowed themselves to accept the protection of aliens and had not even been roused to self-assertion by the example of the Japanese and Chinese,

<sup>1</sup> Lord Milner's love of segregation reappeared in his scheme in 1920 to impose segregation in residence and business in Kenya, a device fortunately rejected by the final settlement. Similarly, his approval of exploitation of native labour in Kenya is shown in his dispatch, 22 July 1920 (Cmd. 873). His attitude, as shown in his conception of Imperial relations, was true to the doctrine of racial superiority to the last, and undoubtedly, now as in his lifetime, his view has many followers. But it is not a possible basis for retaining India in the Empire. Nor does a naturalized South African Jew appear really more British than an Indian.

racés without claim to Indo-European blood. The dislike of the Boers for British Indians shown henceforth as persistently as before the war in the Transvaal may be regretted, but it was after all the natural outcome of a belief in racial superiority, and the Boers never owed any moral duties to India as did the British.

The campaign began before responsible government was actual. An *Asiatic Law Amendment Ordinance* was passed in 1906 requiring the registration of all Asiatics, but Lord Elgin was at least prepared to defer it until the new régime, although he had distinguished himself by permitting the Executive Council of the Transvaal to protest against the decision of the Imperial Government on Chinese labour, an exhibition of more than normal humility. Needless to say, he gave in forthwith to the new legislature when it enacted the same measure as a law (No. 2 of 1907). The letters patent, it was true, had expressly required the reservation of any law differentially affecting non-Europeans, and insistence on the principle might have now made a definite impression on Transvaal opinion. But the moral courage to unface unpopularity was totally lacking in Lord Elgin, under whose feeble control British prestige in South Africa reached its nadir, despite the enormous Liberal majority in the Commons, and the Act was allowed to come into force.<sup>1</sup> After that, the contest was merely between the amount of pressure which the Colonial Government could apply, and the fear of the Liberal administration lest its more sincere followers should bring it to book for its failure to carry out its avowed principles. The Transvaal Parliament proceeded to pass an Act, No. 15 of 1907, which in effect excluded all Asiatics who had not already acquired a legal right to be there, and took power for the executive to deport from the Colony any person believed to be detrimental to its peace, order, and good government. The Imperial Government begged for an assurance that Indians of rank would not be forbidden entry; if this favour were conceded, and if the Government would promise not to deport persons who had not been convicted of crime, or at least to allow them a chance of appeal to a court, the measure would be sanctioned.<sup>2</sup> There was some measure of resistance to the

<sup>1</sup> *Parl. Pap.*, Cd. 3887, p. 9. Cf. Cd. 3251, 3308; H. C. 65, 1907.

<sup>2</sup> *Ibid.*, Cd. 3887, p. 58.

registration, and the law as to immigration was made more stringent by Act No. 36 of 1908, while the Transvaal Gold Act of 1908, No. 35, contained certain very important disabilities. No right under that law could be acquired by a coloured person, and no holder of a right under that law (e. g. a claim licence or stand licence holder) might permit any coloured person, except his bona fide servant, to reside on, or occupy ground held under, such a right. Further, no coloured person was allowed to reside on proclaimed land in the Witwatersrand mining district except in bazaars, locations, and mining compounds. Existing rights of occupation were safeguarded, but this new disability was hotly resented. Moreover, the Transvaal authorities quite gratuitously showed their indifference to Indian feeling by refusing Mahomedan prisoners the right to observe their religious fasts, and by compelling Hindus to do work involving degradation and loss of caste.<sup>1</sup> Still less attractive was the device by which in 1909 the Transvaal Government, deporting forcibly Indians deemed undesirable, put them over the Mozambique frontier, whence the Portuguese administration in agreement with the Government deported them to India, thus enabling a Colonial Government to get rid of British subjects and preventing them even seeking to assert their rights. The courts were appealed to in vain,<sup>2</sup> through no fault of theirs, but they were bound to pronounce valid the provisions for registration, for deportation, for prevention of immigration. In the meantime the Orange River Colony enjoyed calm, as it had since 1890 effectively kept Indians out, while an Act, No. 12 of 1907, allowed the admission of persons of standing, and so avoided any possibility of awkward incidents. Of minor importance, though galling, were the rules which forbade Indians, like natives, to use sidewalks, to ride in covered cars, to travel first class, and so forth.

The advent of Union promised better things from a government speaking for all South Africa, and under s. 147 solely

<sup>1</sup> *Parl. Pap.*, Cd. 4327, 4584, 5363.

<sup>2</sup> As to deportation, *Hong-Kong v. A.-G.*, [1910] T. P. 348, 432; cf. *Venter v. R.*, [1907] T. S. 910. On entry and registration, *Randeria v. R.*, [1909] T. S. 65; *Naidoo v. R.*, *ibid.*, 43; *Magda v. Registrar of Asiatics*, *ibid.*, 397; *Ho Si v. Vernon*, *ibid.*, 1074; *Chotabhai v. Minister of Justice*, [1910] T. P. 1151; reversed, 4 Buch. App. 305; *Ismail v. R.*, [1908] T. S. 1088; *Laloo v. R.*, *ibid.*, 624. Cf. *Nathalia's Case*, N. L. R. 552, [1912] A. D. 23.



charged with matters differentially affecting Indians. In hope of an accommodation, the Indian Government on 7 October 1910 put forward reasoned proposals, asking for one immigration law based on a language test, but so to be operated as to permit the immigration annually of a small number of educated Indians. Moreover, it was asked that there should be abolished the interprovincial barriers, and the grievances of Indians in Natal be removed. It was added that from 1 July 1911 indentured immigration would cease, as Natal did not evidently desire the Indians to settle permanently, and temporary immigration was not for the good of the Indians. The Union Government agreed to an education test; to the admission of a small number of educated Indians; and to relaxation of the registration law of the Transvaal by taking only a limited number of finger-prints and excusing this in the case of Indians who could write well. But it refused freedom of interprovincial movement, as it was objectionable to allow Natal natives to enter the Transvaal and Orange Free State.<sup>1</sup> Despite, however, this goodwill, nothing was done in 1912, but Mr. Gokhale's visit to the Union resulted in some acceleration of movement after the Imperial Government, now represented by something more active than the amiability of Lord Crewe, had pressed for legislation to meet the legitimate needs of the Indians in the Union.<sup>2</sup> The Act No. 22 of 1913 contained a stringent education clause requiring an immigrant to pass a reading and writing test in a European language, including Yiddish, and by s. 4 (1) (a) authorized the minister to exclude any class of persons whom on economic grounds, or by reason of standard or habits of life, he deemed unsuited to Union conditions, and under this clause Indians were promptly all excluded, save in the very few cases where the Government might waive the provision. Moreover, a concession, the right of entry of one legal wife and minor children under sixteen of a lawfully domiciled Indian, was qualified by the requirement that the marriage must be monogamous. The Act was assailed by Mr. Gandhi, who had been working heart and soul for the Indians in their struggle for their rights, on various grounds, but special force was lent to the attack by the case of Kulsan Bibi,<sup>3</sup> who was refused

<sup>1</sup> *Parl. Pap.*, Cd. 5579; Cd. 5582, p. 47; Cd. 6283, pp. 3, 4.

<sup>2</sup> *Ibid.*, Cd. 6940. Cf. Cd. 7111.

<sup>3</sup> *Ibid.*, Cd. 7111, pp. 39 ff.

admittance because her marriage could not be held monogamous, however much so in fact, so long as under the law her husband could have married other wives without illegality. Moreover, the Act did not repeal the £3 tax imposed on Indians who did not reindenture in Natal, as a means of inducing them to go back to India. Mr. Gandhi<sup>1</sup> then headed a passive resistance movement, and tried to lead a march of Indians into the Transvaal. The movement was put out with some violence and loss of Indian life, Mr. Gandhi and others arrested, but the Government felt that a Commission was necessary to investigate the issues. The Indians declined for various reasons, some valid, to appear before the Commission, but it was able to present a useful report.<sup>2</sup> It reassured the Indians by proving that there was no intention by the Act to weaken the right of Indians in Natal to acquire a legal domicile in the Union, and that the position in the Orange Free State was simply reasserted, complete exclusion of permanent immigrants with limited entry on condition of neither trading nor farming of persons of position. As regards marriages, the Commission recommended that marriages monogamous in fact should be regarded as so in law, and that Indian marriage officers should be enabled to perform monogamous marriages, and such marriages already performed might be registered *ex post facto*. The recognition of polygamy suggested by the Mahomedans was properly ruled out of court. It recommended the extension to three years of permits for absence of domiciled Indians and easier movements within the provinces for temporary purposes. Further, it condemned the £3 tax in Natal under Act No. 17 of 1895, pointing out that it was never intended then to apply it to women, while its extension under Act No. 3 of 1903 to boys over sixteen and girls over thirteen, who did not leave Natal or indenture, was iniquitous. The report of the Commission opened the way to settlement. Mr. Gandhi and General Smuts came to an understanding, and Act No. 22 of 1914 provided for the appointment of marriage officers to perform marriages with monogamic effects; for the registration *ex post facto* of marriages really monogamic; and for the entry into the Union of the wife and minor children of a domiciled Indian, who had no wife in the

<sup>1</sup> Keith, *Imperial Unity and the Dominions*, pp. 207 ff.

<sup>2</sup> *Parl. Pap.*, Cd. 7265.

Union or children living by a woman still living. The £3 tax was repealed utterly, and all proceedings for its recovery barred.<sup>1</sup>

There remained, however, difficulties which the Commission recorded : the prohibition of land holding in the Transvaal ; the restrictions under the Gold Act above noted ; the insertion in grants and leases by municipal authorities of clauses forbidding transfer or leases to Asiatics ;<sup>2</sup> the lack of educational facilities ; the restriction of the right to bear arms ; exclusion from the inside of trams, &c. It dealt fully with the issue regarding licences to trade,<sup>3</sup> power as to which had been conferred on the provinces in 1912 and 1913, and found that the city council of Cape Town refused transfers to Asiatic or new licences, but allowed renewals as of right. In Natal, in the boroughs and townships the councils usually refused licences save for traders in Indian quarters, but refusals for renewals might be carried on appeal to the Supreme Court. Elsewhere there was perfect fairness. The Act of 1914 contained one clause of special interest intended to facilitate the repatriation of Indians, as part of a deliberate plan to solve the problem by eliminating the Indians. Still, Mr. Gandhi obtained an understanding that vested rights of Indians were to be respected, such rights being those of living and trading and moving freely one's residence or business from place to place in a township, with permission for one's successors in title to have the same rights.

In 1917 the grievances of Indians were raised at the Imperial Conference,<sup>4</sup> and in 1918 it was agreed by the Conference that it was only fair that there should be as to immigration reciprocity between India and the Dominions, both being at liberty to prevent permanent settlement but to be ready to allow entry

<sup>1</sup> Ibid., Cd. 7644. For Gandhi, see J. J. Doke, *M. K. Gandhi* (1919) ; M. K. Panikkar, *The Problems of Greater India* (1916).

<sup>2</sup> See *Parl. Pap.*, Cd. 6087.

<sup>3</sup> Some licences, e. g. general dealers', were issued automatically by the Union revenue authorities, others fell under municipal control.

<sup>4</sup> Gen. Smuts then was optimistic of amicable arrangements, as the Union had no longer reason to fear swamping ; *Parl. Pap.*, Cd. 8566, pp. 119 ff. Egerton (*Brit. Col. Policy in the XXth Century*, p. 180) recognizes the justice of the grant of the franchise on sufficiently strict conditions. Rhodes in 1899 claimed no longer 'equal rights for every white man', but 'for every civilized man south of the Zambezi' (Walker, *Lord de Villiers*, p. 342).

for temporary purposes, pleasure, commerce, and study. India also pressed in 1918 for the repeal of the Act of 1885, which had to be evaded by the registration of companies whose members were Indian, and who thus could hold land, and objection was taken to recent rules as to railway accommodation as derogatory to Indian dignity. But no such result was achieved. On the contrary, fresh disasters awaited the Indians. They had since 1914 commenced to trade in many townships where they had not formerly been, despite the fact that in some cases their stands were on proclaimed land, under the Gold Law of 1908, from which they were excluded, while in other cases the land occupied was held under the township's law on conditions forbidding the presence on it of any native or coloured person. Licences to trade were needed by these new traders, and the municipal councils in some cases refused applications, but their refusals were upset on appeal to a magistrate under the Transvaal law. On the other hand, one council obtained from the Supreme Court an injunction forbidding a European to allow Indians to occupy certain stands and shops on the score that the action was forbidden by the Gold Law. The repeal of the Gold Law was demanded, but the petition to Parliament to this effect was indeed referred to a select committee, but at the same time the body was instructed to inquire into the evasion of the law of 1885 by the device of forming companies which, as not being persons in the sense of the law of 1885, could hold land. The committee's report resulted in Act No. 37 of 1919, giving to every trader who on 1 May 1919 was carrying on business under licence on proclaimed land or on a stand or lot in a township, or to his successor, power to continue in the business as established. The operation of the Gold and Township Laws was thus suspended in their case, but the rest of the Act was directed at overthrowing the formation of companies to hold land, it being expressly declared that the prohibition of the Act of 1885 applied to any company in which one or more Asiatics had a controlling interest, while the registration of mortgage bonds over fixed property in favour of an Asiatic was also prohibited.<sup>1</sup> Further, on 3 February 1920 a Commis-

<sup>1</sup> Cf. *Madrasa Anjuman Islamia v. Municipal Corporation of Johannesburg*, [1922] 1 A. C. 500; [1919] A. D. 439; cf. [1917] A. D. 718; Keit, *J. C. L.* iv. 241.

sion was established to report on the land and trading issues as affecting Asiatics. They reported on 12 May *ad interim* in favour of repatriation on a voluntary basis of as many Indians as possible, and their final report was handed in on 3 March 1921. The report was opposed to repeal of Law No. 3 of 1885, or Acts No. 35 of 1908 and No. 37 of 1919. Compulsory repatriation was not advised, but voluntary repatriation strongly favoured. Compulsory segregation was not wise, but voluntary separation should be promoted, municipalities being given the right to lay out residential areas for Indians, and to set aside streets for shops to which licence holders should be attracted, the area to be chosen by an independent body in consultation with the municipal council and Asiatics. A most important point was the recommendation that Indians should not be allowed to hold land for agricultural or farming purposes in Natal outside the coast belt of say twenty to thirty miles, while absolute prohibition under the law of 1885 should continue to apply to the Vryheid, Utrecht, and Paulpietersburg districts of the province. Licences to trade should be made, if possible, uniform, and be managed by municipal councils, while an appeal should be allowed to a special board appointed by the administrator in each province. The immigration laws should be better enforced.

On the other hand, the Imperial Conferences of 1921<sup>1</sup> and 1923<sup>2</sup> saw the acceptance by the Dominion representatives other than those of the Union of the principle of the treatment of Indians in the Dominions as citizens entitled to the same position as other citizens. General Smuts fought hard in 1921 against the resolution, and in 1923 he made an effort to have it reversed. It was a futile hope; his effort to prove that it was consistent to deny Indians civil rights was torn to pieces by Sir Tej Bahadur Sapru, and the Conference left the Union in a minority of one, the Irish Free State generously supporting the Indian claim as a matter of pure right. General Smuts resented the conclusion and refused brusquely to accept the presence of an Indian official to act as an intermediary between the Government and the Indians, whom he unfortunately could only regard from the standpoint of the Transvaal denial of the equality before man or God of the coloured with the—alleged—white. On the contrary, he introduced in the short

<sup>1</sup> *Parl. Pap.*, Cmd. 1474.

<sup>2</sup> *Ibid.*, Cmd. 1988, pp. 66-168.

session of 1924 the Class Areas Bill which was to empower the Government to enforce a segregation of Indians for residential and trading purposes in certain governmental areas. The dissolution of Parliament for the moment ended the situation, but left the new Government with the same insistent public demand for action.<sup>1</sup> It itself took up a new line of attack, for it proposed that the Colour Bar Bill of 1925 should debar by law the Asiatic as much as the native from any kind of skilled work, down, as Mr. Jagger pointed out, to the working of lifts; and the Government, despite every protest, as has been seen, persisted in the policy, though in the long run it consented to enumerate the classes who could have authority to perform skilled work instead of *nominatim* excluding Asiatics, it having been pointed out, *inter alia*, that Japan might well resent, as needlessly insulting, this measure. It was pointed out effectively by the opposition that a Minimum Wage Bill was the proper method of securing fair treatment for Europeans, and that it was ludicrous to pay large sums on education of natives and forbid them to become skilled. The Bill was lost by 17 to 13 in the Senate, but the Government declined to consider the request of the municipality of Durban in July that there should be a conference on the Asiatic question, persisting instead in efforts to deport as many Asiatics as possible on a voluntary basis and in seeking to carry the Class Areas Bill in the session of 1926 in the face of vehement protests of the Government of India, which welcomed with rather exaggerated enthusiasm the concession that the measure should be referred to a select committee for investigation before it passed the second reading, so that representatives of Indian views could appear to point out its demerits. On 23 April, however, the Minister of the Interior announced in the Assembly that, as the result of renewed negotiations with the Government of India, a formula had been agreed upon to determine the nature of a round-table conference for the purpose of 'exploring all possible methods of settling the Asiatic question in South Africa, on the basis of the maintenance of Western standards of life by just and legitimate means'. The Union Government, in order to ensure that the conference should meet under the best auspices, had decided,

<sup>1</sup> Assent was now given to the Natal Ordinance, consistently disallowed by General Smuts's advice, excluding Indians from the municipal franchise.

subject to the approval of Parliament, which was readily accorded, not to proceed farther with the Areas Reservation and Immigration and Registration (Further Provision) Bill, until the results of the conference were available.

No such accommodating spirit, however, was shown as regards the Colour Bar Bill (Mines and Works Act Amendment Bill), which was pressed through the Assembly despite the protests on behalf of the natives by General Smuts, and rejected by the Senate by 22 votes to 12. There followed under the procedure of s. 63 of the *South Africa Act*, 1909, a joint session of the two houses at which the Bill was passed by 83 votes to 67 on May 12. The measure, however, is less offensive to Asiatics than in the earlier form under which it was proposed to strike at them by name. Instead it is enacted that regulations under the *Mines and Works Act*, 1911, may provide that, in certain provinces and areas, certificates of competence in an occupation referred to under paragraph (N) shall be granted only to (a) Europeans; (b) persons born in the Union and ordinarily resident in the Cape Province known as Cape Coloured or Cape Malays; (c) persons residing elsewhere who would, if resident in the Cape Province, be regarded as Cape Coloured or Cape Malays; and (d) the people known as Mauritius creoles or Helena persons, or their descendants born in the Union. Power is given for restricting particular work to the classes mentioned above, apportionment of work as between those classes and others, &c.

In view of the settled intention of the Union Government to seek to solve the Indian question by the process of repatriation it is interesting to note the measure of success attained in 1924 and 1925 by the efforts of the Government to facilitate return to India by the grant of free transport and £10 a head, with a maximum of £50 a family. The numbers were 1,063 in 1924 and 1,400 in 1925, about a third being South African born, mainly minor children returning with their parents, who had been imported. It may be noted that the Mahomedans declined repatriation, and those who took advantage of the offer were the working men, not the traders, so that the voluntary system clearly is utterly ineffective to deal with the really difficult issue of the position of the Indian traders, who find South Africa a fair field in which, treated with the barest justice, they could prosper.<sup>1</sup>

<sup>1</sup> Dr. Malan, House of Assembly, 25 Feb. 1926.

§ 5. *The Kanakas in Australia*

A curious chapter in Australian history consists of the tale of the introduction of Kanakas from the islands of the Pacific into Queensland for labour on the sugar plantations, the current belief being that sugar work was impossible for Europeans. The protection accorded to these natives by the *Pacific Islanders Protection Acts* of 1872 and 1875 was doubtless inadequate, even when Colonial Acts supplemented their defects, but gradually the kidnapping and malpractices of the older régime passed away. But the demand for a white Australia, which grew steadily during the last decade of the nineteenth century, proved fatal at last, and the Commonwealth Parliament legislated in 1901 (No. 16) to deport them gradually. Representations were made by the Aborigines Protection Society which indicated the dangers of the men being returned to islands with which they had lost connexion, while the Resident Commissioner of the Solomon Islands pointed out that those who had contracted irregular marriages when in Queensland, or had otherwise violated native custom, might run serious risks on their return. The Imperial Government held, inevitably, that the matter was one for the Commonwealth to decide, and that Government determined to persist in the policy, but in 1906, by Act No. 22, modified it, so as to afford those who had really made Australia a genuine home permission to remain.<sup>1</sup> Great care was also taken to arrange for the safety of the deportees, whose removal was affirmed as legal by the High Court in *Robtelmes v. Brennan*.<sup>2</sup> It became necessary as a result of the loss of the Kanaka labour to pay high bounties to secure the maintenance of the industry, but it has been established that Europeans accustomed to Australian heat can easily enough do the work, and that immigrants from Italy make excellent workers. The complete elimination of Asiatics from the industry was accomplished in 1913 by legislation by both the State<sup>3</sup> and the Commonwealth. It is anticipated that the output will eventually be sufficient for Australian needs, and that ideal has now been realized, but the retail price of sugar is necessarily put high (4½d. a lb.).

<sup>1</sup> *Parl. Pap.*, Cd. 1285, 1554; *Commonwealth Parl. Pap.*, 1908, No. 173; Turner, *Australian Commonwealth*, pp. 25, 33 ff., 52, 141.

<sup>2</sup> (1906) 4 C. L. R. 395.    <sup>3</sup> No. 4; *Addar Khan v. Mullins*, [1920] A. C. 391.



§ 6. *The Present Position*

The cessation of immigration of any real character into the Dominions has been accepted by India at the conferences of 1921 and 1923, and it renders for Canada, the Commonwealth, and New Zealand—in Newfoundland the climate bars Asiatic settlement effectively—the problem one merely of good feeling and common sense. The Indian or Japanese or Chinese population cannot increase to any substantial degree; it must inevitably become shortly merged in the local population and the slight admixture of oriental blood resulting is wholly negligible. Canada has the only substantial number of Asiatics, and they present a far less serious problem than would be thought from the excitement prevailing in British Columbia, which persists in its demand for the removal of all coloured settlers, ignoring the more serious question of the vast blocks of Galicians, Ruthenians, Doukhobors, and Mennonites, which careless administration encouraged to come to Canada, where they remain refractory elements in the population. There are signs in Australia that the old prejudices are dying down with the disappearance of the fear of swamping. When Mr. Fisher's Government in 1911, with foolish consistency, insisted on removing an unfortunate Chinese wife on technical grounds, public opinion distinctly condemned the action as inhuman, and assaults on Chinese are no longer regarded as laudable. Chinese husbands, indeed, have normally very high reputations, but the Chinese desire to revisit and die in China has long since made the tendency even of those legally in Australia to settle there of extremely limited character. The issue of the possibility of settling the Northern Territory, without Asiatic immigration, is at present faced with the assurance that there is nothing fundamentally unfit for settlement in the area, and that the new form of government will serve to hasten development. At any rate, it is clear that for any time that can be foreseen Australian opinion is extremely unlikely to listen to any idea of deviation from the conviction that Australia must be white and can be kept so.<sup>1</sup> Very important conclusions as

<sup>1</sup> The troubles in 1925-6 regarding Italian immigration into Queensland were in part met by a friendly arrangement for limitation by the Italian Government on the lines adopted as regards Maltese. But if Signor Mussolini's

to the Empire follow from this result, which accords entirely with the conditions affecting New Zealand. It may be hoped that in due course all the minor disabilities imposed on Asiatics in the States and in New Zealand will be withdrawn as unworthy of great states and utterly needless for the public safety.

The case of the Union is infinitely more difficult, because the case of the Indians is bound up indissolubly with that of the natives. The Union Government might indeed have sought a solution along the lines of accepting the Indians as assimilated to the coloured population, but this would have been clearly impracticable on account of the impossibility of drawing any distinct lines between many of the Indians and many of the natives. It has followed, therefore, that Indians and Africans alike have been marked out for the policy of segregation and refusal of the chance of working except as an instrument of unskilled labour for skilled white labour. The theory is ludicrously out of harmony with the facts, and doubtless it is this which has made the Union so desperately anxious to expel to India people of whom some 70 per cent. have never known any but a South African home. The immorality of such action is clear and convincing to all save those who, like Mr. van Hees, hold that there is a fundamental right of the white population to dominate all coloured people.<sup>1</sup>

place in the sun includes Australia, and pressure is tried, a very serious situation will arise. The Italians work hard, but do not mix, and remain self-contained units.

<sup>1</sup> For the agreement of 1927, see App. B.

## TREATY RELATIONS AND FOREIGN POLICY

§ 1. *Imperial Control in Treaty Matters*

IT remains true, despite the advance of the Dominions to international status, that no treaty in the full sense of that term can be concluded save under full powers granted by the King on the advice of the Imperial Government, and that no treaty can become operative—save in cases where by reason of urgency ratification is formally dispensed with—without the ratification of the King, which again is accorded by the advice of the Imperial Government, formally signified in each case by the counter-signature of the Secretary of State for Foreign Affairs to the essential instruments. The history of the development of self-government in the Dominions naturally depends largely on the process by which the action of the Imperial Government has come to be guided by the wishes of the Dominions, but the resolution of the Imperial Conference of 1923, to which reference will be made below, still leaves the essential position untouched.<sup>1</sup>

As opposed to formal treaties, which are concluded under full powers from the Crown and ratified by the Crown, there are local arrangements which are concluded by agreements between heads of local governments with similar officers in other States. The responsibility for carrying out such agreements does not rest with the Crown and the Imperial Government, unless they have expressly authorized such agreements ; otherwise it is not a matter of international relations proper, but merely an ordinary contractual relation. Types of such agreements approved by the Imperial Government are Lord Milner's agreement with the Governor-General of Mozambique in 1901,<sup>2</sup> that of Lord Selborne with the ex-Governor-General of that territory in 1909,<sup>3</sup> and the further agreement of 1923<sup>4</sup> which was signed

<sup>1</sup> Keith, *J. C. L.* v. 161 ff. ; vi. 135, 193 ; vii. 106 ; *Constitution, Administration and Laws of the Empire*, pp. 48 ff., 101 ; *War Government of the Dominions*, pp. 146 ff.

<sup>2</sup> *Parl. Pap.*, Cd. 2104, p. 189.

<sup>3</sup> *Parl. Pap.*, Cd. 4587. An informal agreement was also made to deport Indians from the Union via Lourenço Marques.

<sup>4</sup> *Parl. Pap.*, Cmd. 1888.

at Lisbon for the Union Government. None of these three agreements are properly speaking treaties, but they definitely had sanction from the Imperial Government. On the other hand, the arrangement between the Canadian and United States Governments in 1911<sup>1</sup> for reciprocity was never a treaty, despite its enormous importance, and the Imperial Government was not asked formally to approve it, nor had it any responsibility for it. As will be seen, it is the object of the resolution of 1923 to afford a more satisfactory means of dealing with such large questions as that of 1911, but the procedure of 1911 is still available for use. The High Commissioner for South Africa in the days before the annexation of the Transvaal and Orange Free State was entrusted with a power of negotiation with these bodies,<sup>2</sup> and a number of agreements were made by him in this capacity, as for instance that with the Transvaal as to Swaziland in 1894. Agreements were also entered into by the Governors of the two colonies and the States, as in the telegraph convention of 11 August 1884. Quite informal, though strictly observed, were the agreements of Queensland with Japan in 1899 and of the Commonwealth with that power in 1904 as to immigration.<sup>3</sup>

There is no doubt as to the principle that a treaty concluded by the King on the advice of the Imperial Government binds the whole Empire, unless its operation is strictly expressed to be local in effect. In many cases local limitation is easily possible, e. g. in a treaty respecting trade between Canada and France; in other cases, e. g. a treaty of alliance, local limitation can only be partially effected. Thus the Locarno Pact of 1925 imposes on the Crown the obligation to render armed aid, that is to go to war, on certain eventualities occurring, and by doing so the Crown inevitably becomes involved in war in respect of the whole area of the British Dominions. But the pact does exempt the Dominions and India from obligation to render active aid in the case of such a war, unless the pact is accepted by the

<sup>1</sup> The precariousness of the arrangement told against it; Skelton, *Sir Wilfrid Laurier*, ii. 372 f.

<sup>2</sup> Cf. Lord Selborne's Commission, 1905, clause iii; Lord Gladstone's, 1910. For the old conventions, see *Cape Parl. Pap.*, 1898, G. 81.

<sup>3</sup> *Queensland Parl. Pap.*, 1899, A. 5; *Commonwealth Parl. Pap.*, 1905, No. 61.

Governments of the Dominions or India, so that the contracting powers admit that the aid they are entitled to receive from the Crown is limited by this exclusion. The Dominions and India for their part are exempt from the normal obligation to afford their full aid to the Empire in case of war, for example, in any war in which the Empire might necessarily be involved under the terms of the Covenant of the League. Agreements, not of treaty character, necessarily bind only those parts of the Empire by which they are made. The breach of treaties may under international war be a just *casus belli*, but that cannot be said of partial arrangements not being treaties, for by accepting this form any foreign State admits that it does not look to the Crown as guaranteeing fulfilment.

It has, indeed, been argued that the power of the Crown to enter into binding treaties is subject to the approval of Parliament, and in the case of colonies of their legislatures also. The only serious piece of evidence ever adduced for this doctrine is a remark of Lord Kimberley in 1872 during the discussion of the question of an Australian customs union. He expressed the opinion<sup>1</sup> that the power of making treaties rested with the Imperial Government, subject to legislation being passed by the Imperial and Colonial Parliaments when necessary to enable the treaty to be put into force. But this is not to be understood as referring to a constitutional or legal limitation of the treaty power, comparable to that contained in the United States constitution, where treaties require the assent of the Senate, or in many European constitutions where the assent of Parliament to all or most treaties is essential.<sup>2</sup> In these cases the legislature or a house thereof is part of the treaty power, and anything not approved is a mere project. There is still no legal limitation of the power of the Crown to make treaties, and the extent to which Parliament is consulted is a matter which is wholly irrelevant to international law. Moreover, even as to practice, there has been no serious effort in the United Kingdom or elsewhere to establish the rule that there shall be consultation with Parliament before a treaty is made, and the doctrine was energetically repudiated for the Irish Free State by the Presi-

<sup>1</sup> *Parl. Pap.*, C. 576, pp. 6-10; Quick and Garran, *Const. of Commonwealth*, p. 770; Todd, *Parl. Government in the British Colonies* (ed. 2), p. 275.

<sup>2</sup> Cf. *Parl. Pap.*, Cmd. 2282.

dent in 1926. The time for consultation is after conclusion and before ratification, though even now as to minor treaties the Government of Mr. Baldwin has refused to be bound to submit for formal approval, a doctrine accepted by Mr. R. MacDonald's Government in 1924.<sup>1</sup> A similar practice exists in the Dominions. The result, therefore, is that a treaty concluded by the Crown is understood by all contracting parties to be certain of ratification only after submission to Parliament, though the British system of responsible government gives the assurance that the Government will normally spare no effort to secure ratification. Nevertheless, it cannot be too clearly understood that ratification can be expressed by the Government without Parliamentary sanction, and, whereas in the Anglo-French Agreement of 1919 regarding the defence of France from German aggression it was the Parliaments of the Dominions which alone were empowered to make the agreement binding on the Dominions, the Locarno Pact gives the power to the Governments of the Dominions and India. There is much to be said against the change <sup>2</sup> in this case, because it is perfectly clear that no Dominion, not even New Zealand, could accept such an obligation without sanction from Parliament, and the best excuse for the change is the fact that in India it was determined to keep the matter for the Government, an attempt to raise it in the Assembly being ruled out by the Governor-General. But the fact is significant of the existence and vitality of the doctrine of the sole power of the executive to conclude treaties. Moreover, it must also be recognized that the autonomy of the Dominions is similarly merely a matter of internal concern, apart from their curious status under the League of Nations ; a treaty concluded by the Crown could bind them against their will, though it is now an essential part of the constitutional understandings in the Empire that they should never be bound save with their own consent.

Can there be a treaty in international law between two parts of the Empire ? This query is naturally suggested by the three treaties made with the Irish Free State between 1921 and 1925.

<sup>1</sup> Mr. Ponsonby, House of Commons, 1 April 1924.

<sup>2</sup> Canada proceeded to neutralize it in June 1926 by resolving that the assent of Parliament was essential to any treaties involving military or economic sanctions.

The Irish Free State Government has contended that it has theoretically and practically the right to register the treaty under the Covenant of the League of Nations with the League Secretariat.<sup>1</sup> The denial of this right by the Imperial Government does not appear to have received the support of the other Dominions, nor does the claim that for these purposes the Empire is a unity forbidding treaty relations between the parts *inter se* appear to rest on any conclusive basis. But that does not carry the matter farther than a question of the interpretation of the League Covenant, and there can be no doubt of the general rule that agreements between different parts of the Empire are not treaties proper.

Quite different from the question of the power of the Crown to make treaties is that of the effect of treaties on the law of the land. In the United States a treaty is part of the law of the land, and, despite conflicting decisions, can clearly override the common law in any State of the Union. How far it overrides statute law is more difficult of ascertainment. But it is very dubious whether a treaty enables the Crown to alter the law of that land in any measure. The regular practice has always been to seek statutory authority for any change in law necessitated by treaty stipulations, and this is a strong indication that the treaty alone would not have any effect to alter the rights of British subjects. But it is clear that by treaty the Crown can cede territory,<sup>2</sup> probably without statutory authority, and thus can deprive subjects of their allegiance and of their legal rights. Can it do less and simply alter these rights? The issue might have been decided in *Baird v. Walker*,<sup>3</sup> for Sir B. Walker interfered with Mr. Baird's property in Newfoundland under a *modus vivendi* as to the fisheries with France, and in the Newfoundland Court<sup>4</sup> sought to meet a claim by the plea that his action was an act of state. The Privy Council declined to

<sup>1</sup> British Government to League of Nations, 27 Nov. 1924; discussed by Keith, *J. C. L.* vii. 108 f.

<sup>2</sup> Forsyth, *Cases and Opinions on Constitutional Law*, pp. 182-6; Heligoland debate, *Hansard*, cccxlvii. 764.

<sup>3</sup> [1892] A. C. 491. See also *Damodhar Gordhan v. Deoram Kanji* (1876), 1 App. Cas. 352; *The Parlement Belge* (1884-5), 4 P. D. 129; 5 P. D. 197. A statute can never be overridden by treaty; *In re Californian Fig Syrup Company's Trade Mark*, 40 Ch. D. 620; *In re Carter Medicine Company's Trade Mark*, [1892] W. N. 106.

<sup>4</sup> 1897 *Newfoundland Decisions*, 490.

accept the plea as adequate, ruling that, if the treaty were relied on as justifying the action taken, it must be specially pleaded. They declined to commit themselves on the question whether treaties of peace, or treaties akin to such treaties, or any other treaties, could authorize overriding the common law rights of British subjects in Newfoundland. The Imperial Government, however, apparently felt convinced that it was no use seeking to carry the matter farther, and paid in lieu damages for property destroyed by Sir B. Walker. Again in *Brown v. Lizars*<sup>1</sup> it was laid down that extradition requires a law as well as a convention, and cannot be carried out merely on the strength of the latter. There are a number of Transvaal cases<sup>2</sup> which show that legislation is requisite to give effect to a treaty, and, though the power of treaties to invalidate legislation has been asserted in British Columbia,<sup>3</sup> it has been rejected elsewhere in Canada.<sup>4</sup> The illegality of various anti-Japanese acts in British Columbia has always rested on the repugnance of such acts to the Dominion statutes putting in force the Anglo-Japanese treaties, and Mr. Deakin quite correctly insisted in 1902 that the law of the Commonwealth could not be altered by treaty. It is, in fact, clear that to admit that it could be would allow very serious inroads on legislative sovereignty.

The rule, accordingly, has always been for legislative effect to be given to treaties,<sup>5</sup> and when the local law requires change it has in all commercial matters regularly been left to the Dominions to enact these laws, either by themselves or contemporaneously with Imperial legislation where that was requisite. Thus both the Imperial and Canadian Parliaments

<sup>1</sup> 2 C. L. R. 837. See also the New Zealand cases, *Wi Parata v. Bishop of Wellington*, 3 N. Z. J. R. (N. S.) S. C. 72; *Nireaha Tamaki v. Baker*, 12 N. Z. L. R. 483, overruled in [1901] A. C. 561. Cf. *Vincent v. Ah Yeng*, 8 W. A. L. R. 145.

<sup>2</sup> *Tsewu v. Registrar of Deeds*, [1905] T. S. 30; cf. [1904] T. S. 241; *Greenberg v. Williams*, 3 H. C. G. 336; *Cook v. Sprigg*, [1899] A. C. 572; 9 C. T. R. 701. See also *Stoeck v. Public Trustee*, [1921] 2 Ch. 67, 71; *In re Employment of Aliens* (1922), 62 S. C. R. 293, 304.

<sup>3</sup> *Tai Sing v. Maguire*, 1 B. C. (Irving) 101.

<sup>4</sup> *A.-G. for New Brunswick v. C. P. R. Co.*, discussed in 2 *Can. Bar Review*, 211; Keith, *J. C. L.* vi. 201 f. The Privy Council refused to allow appeal, 94 L. J. P. C. 142.

<sup>5</sup> Cf. *Wigg v. A.-G. of the I. F. S.* (1927), 43 T. L. R. 457.



legislated to give effect to the reciprocity treaty of 1854 and the Washington treaty of 1871 with the United States, while the Imperial and Newfoundland Parliaments legislated in 1904 for the Anglo-French treaty of that year. Canada legislated in 1906, 1911, and 1913, regarding the Anglo-Japanese treaties as applicable to the Dominion, and repeatedly of recent years to give effect to her numerous treaties of commerce, and the other Dominions have more sparingly acted in this way. Since the peace conference of 1919 it has become the constitutional practice for the Dominions to legislate on great political treaties such as the treaties of peace of 1919 and subsequent years, or the important Washington treaties of 1921-2, or the statutes for the Court of International Justice. This is in entire harmony with the development of the Empire, but instances have occurred in the past when Imperial legislation has been required to implement obligations which Newfoundland did not care to make good. Thus in 1891<sup>1</sup> an Imperial Act would have been brought in to override Newfoundland legislation in order to secure French rights but for the Colonial Government's promise to pass the necessary measure. On 9 September 1907<sup>2</sup> Newfoundland laws were actually overridden by Order in Council under the Imperial Act of 1919 to secure the uninterrupted operation of the *modus vivendi* with the United States of 7 September 1907, and the Order was withdrawn only when in 1908 the colony undertook to secure the operation of the *modus vivendi*.

But it is not for any foreign power to decide whether Imperial or local legislation is proper; Mr. Bayard on 10 May 1886<sup>3</sup> indeed attempted to hold as regards Canadian action to enforce the fisheries treaty that not only was the Imperial Government alone entitled to interpret the treaty—which may be conceded in the ultimate issue—but that it alone could take measures to carry it out. The reply<sup>4</sup> of the Imperial and Dominion Governments was perfectly convincing; it was pointed out that the treaty was with the Crown; that the Crown was present in Canada; and that acts of Canadian officers and legislatures were expressions of the will of the Crown, as had been recognized in practice for forty years, while both the treaties of 1854 and

<sup>1</sup> *Parl. Pap.*, C. 6044, H. L. 76, C. 6256, 6334, 6365, 6488, 6637, 6703.

<sup>2</sup> *Parl. Pap.*, Cd. 3765, p. 168. Cf. Cd. 3262.

<sup>3</sup> *Parl. Pap.*, C. 4937, p. 37.

<sup>4</sup> *Ibid.*, p. 85. Cf. p. 120.

1871 expressly provided for ratification by the provincial legislatures. The United States Government hastily dropped the untenable suggestion. Similarly, the effort of France in 1891-2<sup>1</sup> to insist that Britain should enforce the French treaties by her legislation, colonial legislation being inadequate, was firmly repelled. It is, in fact, plain that the Crown must carry out its obligations, but it can carry them out as it pleases, and both the constitutions of Canada and of the Union expressly admit this power of legislation for treaty ends.<sup>2</sup> The tribunal which arbitrated on the North American fisheries in 1910<sup>3</sup> expressly recognized that both Canada and Newfoundland would be able to legislate for the fisheries in such a way as to bind American citizens. It is, however, clear that the final decision as to the interpretation to be put on a treaty by the Crown may be claimed by the Imperial Government in the ultimate issue, since it must bear the brunt of any foreign demand. Thus in 1875<sup>4</sup> the Imperial Government ruled that British Columbia, having entered the union in 1871, could not claim the benefits of the Washington treaty of 1871, and in 1907<sup>5</sup> it asserted its determination to refuse the Newfoundland contention that the American treaty rights were so clear that the British view should be enforced regardless of the protests of the United States.

The application of treaties to newly acquired territories presents certain points of difficulty, but the general rule<sup>6</sup> is clearly that such territories fall under any general treaties affecting the Crown generally, apart from the fact that under modern constitutional usage such territories would have been given an option to choose whether the treaty would or would not become applicable to them. Thus it cannot be doubted that the Transvaal and Orange River Colony when annexed immediately fell under all general British treaties.

<sup>1</sup> *Parl. Pap.*, C. 6703, p. 47.

<sup>2</sup> 30 Vict. c. 3, s. 132; 9 Edw. VII. c. 9, s. 148.

<sup>3</sup> *Parl. Pap.*, Cd. 5396 and Cd. 6450.

<sup>4</sup> *Canada Sess. Pap.*, 1876, No. 42; 1877, No. 100 (French duty on ships).

<sup>5</sup> *Parl. Pap.*, Cd. 3765.

<sup>6</sup> Keith, *State Succession in International Law*, p. 21; Westlake, *Int. Law*, i. 67. All old treaties still bind the Irish Free State.

§ 2. *The Separate Adherence to and Withdrawal from  
General Commercial Treaties by the Dominions*

It was naturally the custom in early treaties to provide for their application to the colonies as was done in the treaties<sup>1</sup> with the Argentine in 1825, Norway and Sweden in 1826,<sup>2</sup> Bolivia in 1840, Russia in 1859, Switzerland in 1855, Belgium in 1862, and the North German Confederation in 1865: these last two treaties being generous enough to give foreign goods national, and not merely most favoured nation, treatment in the colonies. The Austro-Hungarian navigation treaty of 1868 bound all the colonies, save that where they had closed the coasting trade to all but British ships the reservation might remain, but the commercial treaty of 1876 was quite general of application. In the next year, however, the Imperial Government agreed that the colonies should no longer automatically be bound, but should be given the right to adhere within two years.<sup>3</sup> This was done in the Montenegro treaty of 1882, and in the very important treaty with Italy of 1883, one year being allowed, and similar treaties were concluded with Honduras in 1887, Mexico in 1888, and Muskat in 1891. The further right of separate withdrawal was only asserted in 1899 and 1900, when treaties with Uruguay and Honduras permitted any responsible government colony to withdraw on giving six (or twelve) months' notice. A resolution of the Colonial Conference of 1902 declared in favour of reserving the coasting trade of the colonies to countries which gave reciprocity, and in pursuance of this arrangements were made in 1904-5 to obtain for the Dominions power to withdraw from the Greek treaty of 1886.<sup>4</sup> In 1906 the inconvenience of treaty restrictions was seen clearly by the Dominions in the inability of Australia to confine preference to British goods imported in British ships, as this reservation ran counter to the Russian treaty of 1859,<sup>5</sup> and

<sup>1</sup> *Parl. Pap.*, Cd. 3395, 3396.

<sup>2</sup> This was relied on in 1926 by Norwegian ships to claim national treatment for their ships on the Great Lakes.

<sup>3</sup> *Canada Sess. Pap.*, 1883, No. 89. Cf. also the *Mail Ships Act*, 1891 (54 & 55 Vict. c. 31), which contemplated colonial concurrence in the issue of Orders in Council bringing it into force.

<sup>4</sup> This treaty disappeared in 1926, a new convention replacing it.

<sup>5</sup> Denounced by Russia in 1917.

probably the Austro-Hungarian treaty of 1868,<sup>1</sup> and any other treaties giving most favoured nation treatment in matters of navigation. In 1907, therefore, a new statement was made in favour of reserving the coasting trade, the United Kingdom dissenting so far as the proposal to treat inter-imperial trade as coasting trade was concerned. But the Conference led to obtaining power in 1907-8 to withdraw from the treaties with Paraguay, Liberia, and Egypt by giving a year's notice for any of the Dominions. The rule accordingly is now absolute, that in any negotiation for concluding a treaty an effort is made to secure for the Dominions and India the privilege of separate adherence and separate withdrawal. This was secured in the case of Nicaragua, Rumania, and Bulgaria in 1905 ; of Servia in 1907 ; of Montenegro and Honduras in 1910 ; and of Japan in 1911, and thenceforward with absolute regularity. A special favour has also been secured for the Dominions in some recent treaties by providing that the products of the Dominions shall be entitled to most favoured nation treatment in the foreign country concerned, so long as the Dominion gives such treatment to the foreign country, a curious and one-sided arrangement.<sup>2</sup> Progress has also been made, under a further resolution of the Imperial Conference in 1911, in ridding the Dominions of the possibility of being bound by old treaties ; thus in 1911 Sweden accepted the right of separate termination by the Dominions ; France, Denmark, and Colombia in 1912, Norway and Costa Rica in 1913, and Switzerland in 1914. But Italy remained obdurate, despite the anxiety of Australia which displayed a remarkable eagerness to rid herself of treaty obligations to secure the right to retire.<sup>3</sup> But with minor exceptions the position now is clear that the Dominions are bound by no treaties from which they cannot retire, and with the lapsing of the older treaties through the war and other causes are bound by very few treaties to which they have not fully subscribed.<sup>4</sup>

<sup>1</sup> Now terminated for both countries. See the treaties with Austria of 1924 and Hungary of 1926 for the present relations.

<sup>2</sup> e. g. in the treaty with Siam of 1925 ; Germany declined to adopt this. In 1925 Canada by Act gave Finland most favoured nation treatment in order to obtain the advantage of the treaty.

<sup>3</sup> The objections to termination of the whole treaty precluded such action.

<sup>4</sup> As regards Persia an additional compact was made in 1920, and under it Canada and Australia withdrew in 1922.

It is of course possible that foreign governments may refuse to accept special clauses for the Dominions, in which case they must simply be left out, as was the case in the Anglo-French treaty of 1882. The matter has been extended naturally to such cases as treaties affecting privileges of mail ships, and is recognized in the *Mail Ships Act*, 1891, which contemplates the assent of colonies to Orders in Council issuing under its terms.

Of the older treaties those with Belgium of 1862 and with the North German Confederation of 1865 imposed a special disability on the colonies by preventing them from discriminating in favour of British goods. This condition of affairs was strongly denounced by the Ottawa Conference on commercial relations of 1894, which asked the Imperial Government to secure abrogation of the treaties. The Government of the day demurred; it was feared that the result of such abrogation might prove injurious to Canada, which had an important trade with Germany, and the Imperial Government itself did not favour differential treatment in these matters, and had no desire to be favoured if it meant denouncing two treaties. In 1897, however, at the formal Colonial Conference the demand was repeated; it had a new content in that it was no longer theoretical but was necessary if Canada<sup>1</sup> were to be able to accomplish her desire to give British preference, and it was duly accorded in 1898. The result was a tariff war with Germany, which Canada, after seeking to avert, faced in 1903 by imposing a surtax of a third on German imports.

The position created under the régime of separate adherence and withdrawal is complex and decidedly in favour of British subjects in the Dominions. The rights dealt with in such treaties fall into two classes, one of which inures to all British subjects, though born in, or domiciled or resident in, a Dominion which does not adhere to a treaty. Thus even in so modern a treaty as that with Germany of 2 December 1924<sup>2</sup> a great

<sup>1</sup> Skelton, *Sir Wilfrid Laurier*, ii. 74-7; on the tariff war, 358 f. The *modus vivendi* with Belgium was accepted by Queensland in 1899, but denounced at the request of the Commonwealth in 1919.

<sup>2</sup> *Parl. Pap.*, Cmd. 2345 and 2520. Cf. that with Austria 22 May 1924 (Cmd. 2176); that with Latvia 22 June 1923 (Cmd. 1995); agreements with Lithuania 6 May 1922 (Cmd. 1711); Albania, 10 June 1925 (Cmd. 2522); Bulgaria, 12 Nov. (Cmd. 2556); Rumania, 1923 (Cmd. 1925); Finland,

number of privileges are conferred on British subjects as such ; these include acquisition and disposal of movable and immovable property on a most favoured nation basis as regards acquisition and on national conditions as regards disposal and inheritance ; the export under national conditions of their property ; freedom of entry and residence on most favoured nation terms ; similar freedom as to exercise of professions, &c. ; exemption from compulsory military service, from administrative, municipal, and judicial functions save as regards juries ; from pecuniary contribution in lieu of service and from all military exactions other than those connected with land or compulsory billeting. On the other hand there are conditions affecting goods imported from one country into the other, or exported from one country to the other, and the treatment of vessels. These, the treaty makes clear, will not apply to those parts of the Empire which do not adhere to the treaty. On the other hand, there is no discrimination as regards the right of consular officers, if the laws permit, to represent non-resident heirs, or as regards protection for patents, trade marks, and designs. It may be granted that there is some unfairness in stipulations, which, e. g. open Japan to Australians, but close the Commonwealth to Japanese. But the matter is obviously difficult. It is not easy to find a mark which would characterize a British subject as definitely settled in a Dominion, though the Dominion criteria of nationality or citizenship might be adopted, and in any case if foreign countries object to the system, which they have a perfect right to do, it is for them to take action. Clearly the United Kingdom could make no objection if they declined to accept the theory that British subjects connected with a Dominion which does not adhere to a treaty can have any rights under it, and common sense would suggest that, if these privileges are to be claimed, they ought to be expressly conferred in such a manner as to be free from any doubt as to their application. The matter may at any time have to be settled by arbitration ; thus under the treaty with Siam of 14 July 1925 <sup>1</sup> the Permanent Court of International Justice may at any time be called on to lay down what is the precise position when the treaty does not apply to a Dominion

14 Dec. 1923 (Cmd. 2243) ; Spain, 31 Oct. 1922 (Cmd. 2188) ; Estonia, 18 Jan. 1926 (Cmd. 2709).

<sup>1</sup> *Parl. Pap.*, Cmd. 2643.

as regards the rights of British subjects, nationals, or citizens of that Dominion.

It must be noted that the general treaty with Siam<sup>1</sup> of the same date illustrates the power of the Imperial Government to make a treaty for the whole Empire which applies absolutely to the Dominions in certain of its articles, and these the most important, while as regards others it is facultative. The general treaty contains the most important renunciation of the special privileges regarding jurisdiction hitherto enjoyed first in a full form, and under the treaty of 1909 in a modified form, there being maintained only for a limited period the right of evocation of cases from Courts inferior to the Supreme or Dika Court. It is clear that such a renunciation must be absolute and apply to the cases of Dominion British subjects, and that it does so appears with special clearness from the fact that, whereas articles 2 to 4 of the treaty are made facultative in their application, the rest of the treaty is general, and the treaty was ratified without any reference to the Dominion Parliaments. Similarly the treaty renounces absolutely for the whole Empire any attempt to claim control over the tariffs of Siam, on the sole condition that other powers entitled to specially favourable treatment in tariff matters likewise renounce their rights without setting up any special conditions in their own favour as compensation for the concession of tariff autonomy. The Imperial Government similarly is concerned with the safeguards which it has by an exchange of notes<sup>2</sup> secured from the Siamese Government for the maintenance pending the complete organization of the judicial system of Siam of British lawyers in legal positions in Siam.<sup>3</sup>

Further, it has been the practice ever since the conclusion of the Anglo-Greek treaty of 1904 to seek to secure for the

<sup>1</sup> *Parl. Pap.*, Cmd. 2642.

<sup>2</sup> *Parl. Pap.*, Cmd. 2644.

<sup>3</sup> Similarly all British subjects clearly fall under the jurisdiction of the Turkish Courts under the treaty of Lausanne, whether the Convention as to Conditions of Residence and Business and Jurisdiction is declared to apply to a Dominion or not. In such cases jurisdiction where left is exercised under authority of the Order in Council of 12 Aug. 1924 under the *Treaty of Peace (Turkey) Act*, 1924 (14 Geo. V, c. 7); cf. Dicey and Keith, *Conflict of Laws*, (ed. 4), pp. 71 ff. So also the renunciation of jurisdiction in Albania of 6 Feb. 1926 (Cmd. 2616) is for the whole Empire. For the former condition of affairs in Siam, see *B. Y. B. I. L.* 1926, pp. 121 ff.

Dominions special advantages in general treaties, Newfoundland then obtaining favoured treatment for her codfish. Great efforts were made in the Anglo-Portuguese treaty <sup>1</sup> to see that nothing was done by way of concession to Portugal regarding her wine to injure the Dominion wine industry, and in connexion with all new commercial negotiations, in addition to securing the privilege of adherence and withdrawal, the Dominions are consulted as to their interests, while the Board of Trade has included representatives of Dominion interests in the Advisory Committee.

### § 3. *Separate Commercial Negotiations with regard to the Dominions*

It was from the first obvious that nothing in the way of general treaties could be adequate to meet the special needs of the Dominions, and that it was only right that special conventions should be arranged for their benefit. Further, it was obvious that in negotiations for this end the association of Dominion negotiators must be essential. The most brilliant early instance of such co-operation was that of 1854 when Lord Elgin at Washington succeeded in securing, in close co-operation with Canadian statesmen, the conclusion of the famous reciprocity treaty, which at the time proved of incalculable value to Canada as helping over the period of difficulty caused by the British policy of free trade and the cesser of all preferences to the Dominions. In 1865 <sup>2</sup> the Imperial Government was ready to associate Canadian representatives in further negotiations for a new instrument to replace that of 1854, which the United States had determined to be rid of as too favourable to Canada, but nothing resulted owing to American reluctance. In 1874 Mr. G. Brown fruitlessly discussed possibilities at Washington, while in 1871 Sir J. Macdonald in association with a British delegation had achieved the settlement of the treaty of Washington. In 1877-84 Sir A. Galt and Sir C. Tupper made various efforts with the aid of the Imperial Government to come to terms with France and Spain. It was originally laid down by

<sup>1</sup> Cf. 5 Geo. V, c. 1. Newfoundland adhered in 1916 to the treaty of 1914. Similarly as regards the Spanish treaty of 31 Oct. 1922 (*Parl. Pap.*, Cmd. 2188).

<sup>2</sup> *Parl. Pap.*, C. 703, pp. 8 ff.; 8 Feb. 1867, I, p. 13; Lewis, *George Brown*, p. 227.



the Foreign Office that the Canadian negotiator in these cases should be regarded merely as an assistant to the representative of the Crown, but Sir A. Galt deprecated this distinction from the position given to Sir J. Macdonald in 1871, and in the long run the Foreign Office capitulated and agreed that, had Spain been willing in 1884 to sign a treaty at Madrid, the result would have been signed by both the British representative and the Canadian as plenipotentiaries of the Crown. In 1888 however, Sir C. Tupper, who had in 1887 negotiated direct with Mr. Bayard, United States Secretary of State, actually signed along with Mr. Chamberlain the treaty of Washington,<sup>1</sup> which, however, was never ratified by the United States. In 1892<sup>2</sup> Canadian ministers were associated with Sir C. Pauncefoot in negotiations at Washington which proved abortive. But in 1893 Sir C. Tupper signed with the British Ambassador and Sir J. Crowe an important treaty regarding trade between France and Canada. The treaty was essentially<sup>3</sup> the work of Sir C. Tupper, though he was aided throughout by Sir J. Crowe, whose knowledge of French was indispensable to the statesman. In 1890 and again in 1902 Sir R. Bond was permitted to negotiate at Washington for treaties improving the commercial relations of Newfoundland and the United States. The former negotiations resulted in the preparation of a convention which, however, was not completed owing to the strong opposition of Canada which held that her own position towards the United States would be seriously compromised by the concessions which Newfoundland was to obtain, while the convention duly signed in the latter year was defeated by the refusal of the United States to consent to ratification, on the score that the treaty would injure the interests of American fishermen, whose case was pleaded by a curious irony with the support of long citations by Senator Lodge of Kipling's *Captains Courageous*. The principles involved in these negotiations had been that the British diplomatists accredited to the foreign government took an active part in the negotiations, though this was so in very varying degrees in different cases, and in 1884 the Imperial Government was prepared to allow Sir C. Tupper to deal alone with the Spanish

<sup>1</sup> Skelton, *Sir Wilfrid Laurier*, i. 373 f.; *Commons Deb.*, 1887, p. 356.

<sup>2</sup> Canada *Sess. Pap.*, 1893, No. 51. Cf. *Commons Deb.*, 1892, p. 1952; Ewart, *The Kingdom Papers*, i. 68. ff.

<sup>3</sup> *Ibid.*, No. 52.

Government if that Government had been willing to consider seriously the conclusion of a convention and to discuss details. In 1907,<sup>1</sup> however, and again in 1909, a slight change occurred. The Canadian ministers who desired to negotiate with France expressed the view that it was hardly necessary that they should actually work along with the British representative at Paris, who could only act formally, and Sir E. Grey willingly consented to the absence of such a representative at the discussions, subject to the conclusion of the agreement arrived at formally by the Ambassador as well as the Canadian delegates and subject always to the same control over the negotiation by the British Government as would have been exercised on the former basis. This was readily consented to by Sir W. Laurier, the understanding being that, before the treaty was signed, the Imperial as well as the Dominion Governments should have all its details before them and approve its terms, and both the treaties of 1907 and 1909, the latter necessitated by the refusal of France to accept the former treaty unmodified, were dealt with in this way. The model set has been adopted since as proper and convenient, notably in the treaty with Italy regarding Canadian trade signed at London by Canadian representatives and the Foreign Secretary in 1923.

The principles regulating such treaties were laid down formally in 1865<sup>2</sup> reaffirming in the main earlier usage, and after the Ottawa Conference had asserted the propriety of such steps,<sup>3</sup> they were reasserted in a dispatch from Lord Ripon of 28 June 1895.<sup>4</sup> In the first place, no foreign power must be offered tariff concessions which were not to be immediately granted to all other foreign powers entitled under treaty to most favoured nation treatment in the colony. The propriety of this condition was never doubted, but in view of the final responsibility for foreign affairs resting on the Imperial Government it was intimated that satisfactory arrangements as to legislation to provide for this result must be made before any treaty could be ratified by the Crown. Secondly, any concession made to a foreign state must be extended forthwith and unconditionally to every part of the British dominions, on the score that no

<sup>1</sup> *Parl. Pap.*, H. C. 129, 1910. Cf. *Canada Commons Deb.*, 1907-8, pp. 1265, 1384, 3517-22.

<sup>2</sup> *Parl. Pap.*, C. 703.

<sup>3</sup> *Parl. Pap.*, C. 7553, pp. 53 ff., 147 ff.

<sup>4</sup> *Ibid.*, C. 7824.

part of the Empire would desire to treat another part worse than it did a foreign country; thus in 1892 the Dominion Government had made it clear that it could not assent to an agreement with the United States under which preference would be given in Canada to American over British imports,<sup>1</sup> and conversely it had been informed that Her Majesty would not be advised to assent to any Newfoundland legislation discriminating against the Dominion in favour of the United States, as was proposed under the convention drafted by Sir R. Bond and Mr. Blaine.<sup>2</sup> Thirdly, no colony ought to obtain a favour from a foreign state which would operate with serious detriment to the trade of the United Kingdom, or some other part of the Empire. If such a favour was sought, an effort should be made to secure it for the Empire as a whole, or at least for the colonies specially interested. If that failed, then serious consideration should take place whether the matter should be carried further. Her Majesty's Government fully recognized that they would not be justified in objecting to any arrangements merely because it was not in accord with the commercial and financial policy of the United Kingdom, but they were the trustees for the interests of the Empire as a whole, and they could not approve anything detrimental to these interests, though the colonies might rest assured that sacrifices would only be asked for on adequate grounds. These principles have always guided the Canadian Government, as was emphasized in the Canadian House of Commons on 14 January 1908, when it was explained that every effort had been made in dealing with France to give France advantages in respect only of articles in which the United Kingdom did not seriously compete, while as a matter of course all concessions made to France were given to the whole Empire. Indeed, Canada went so far as to lay down the rule as regards arrangements with the West Indies in 1925 that concessions to them must inure also to the benefit of the United Kingdom.<sup>3</sup>

In his dispatch in 1895 Lord Ripon expressly negated the idea of granting to the Dominions any separate power of

<sup>1</sup> United States Senate, 52 Congress, Sess. 1, *Exec. Doc.*, No. 114; *Canadian Gazette*, xviii. 603; Hopkins, *Sir John Thompson*, p. 402.

<sup>2</sup> *Canadian Gazette*, xviii. 482; *Parl. Pap.*, C. 6303, pp. 14 ff., 33 ff.

<sup>3</sup> See also *Parl. Pap.*, Cd. 5639, p. 21 for the earlier agreement.

negotiating treaties, on the score that it must result in breaking up the Empire, an outcome desired neither by the colonies nor by the mother country. The proposal thus negatived has been long mooted in the colonies but had never come to a decisive issue, involving as it did the wider nature of Imperial unity. But Canada, which had never accepted proposals<sup>1</sup> for a separate treaty power, inaugurated in 1910 a very interesting development.<sup>2</sup> The tariff war between Germany and Canada had been carried on by both sides on the basis of refusing tariff concessions and increasing the normal rates. The German Government was losing heavily as well as the Canadian, and an agreement was informally arranged through the Consul-General of Germany for a cessation of the struggle. There was no treaty, but by Order in Council of 15 February 1910 under the *Customs Tariff, 1907*, the Canadian Government, cancelling the surtax imposed by Order in Council of 28 November 1903, restored Germany to the normal position of a foreign power, while Germany admitted Canada to her normal tariff. A further development was followed by an arrangement with Italy, equally informally concluded through the Royal Consul, and carried out by Order in Council of 7 June 1910, while at the same time were made gratuitously concessions of the same character to Belgium and Holland, whose Consuls had represented their desire to receive consideration. These arrangements were all approved by the Imperial Government, and the Canadian Government readily recognized that, if anything more formal were desired, treaty form should be resorted to. Further, after negotiations between Canadian ministers and United States representatives, an informal agreement was come to under which Canada received certain concessions in the form of the minimum Payne-Aldrich tariff in return for concessions on thirteen minor articles to the United States, carried out by lowering the duties in question generally (c. 16). The United States claim was a quaint one; the minimum tariff was denied to powers discriminating against the United States, and the argument was adduced that the French agreement of 1907-9 might be treated in this light.

No great notice was taken of the new departure in England, but from the discussions of 1910 came a very important con-

<sup>1</sup> Cf. Skelton, *Sir Wilfrid Laurier*, i. 362 ff.

<sup>2</sup> *Ibid.* ii. 365 ff.

vention<sup>1</sup> negotiated on 21 January 1911 between Mr. Fielding and Mr. Paterson and the United States Secretary of State, which provided for a considerable measure of free trade, or trade at a lowered tariff, especially in natural products, including fish, between Canada and the United States. Mr. Bryce, the Ambassador at Washington, was responsible for introducing the Canadian ministers to the President and the Secretary of State, but he did not take part in the negotiations except in so far as he urged on the ministers the duty of regarding Imperial interests, and in reporting the results of the discussions to the Imperial Government. The Canadian ministers were doubtless somewhat 'rushed' by the United States ministry, and were induced to undertake to take from the United States lower duties on certain Canadian exports than were levied on British exports, contrary to the principles laid down in 1895, to which Canada had hitherto meticulously adhered. In the case of the French treaties of 1907 and 1909 full control was exercised, the terms being scrutinized by the Imperial Government before final signature and ratification, Mr. A. J. Balfour's denial of this in the House of Commons on 21 July 1910 having no relation whatever to the facts. In this case Mr. Fielding knew everything about Canadian, but very little as to British, interests, and the Imperial Government never was in a position to intervene successfully. The agreement was not a treaty; it was merely to lead to reciprocal legislation, and the Opposition raised the cry of danger to the British connexion, pointing out that Mr. E. Blake had resigned in 1891<sup>2</sup> rather than countenance the reciprocity policy of that day. Moreover, the President<sup>3</sup> of the United States very tactlessly let it be understood that in his opinion America should welcome the treaty as leading to political merger. In Ontario the Conservative Opposition was strengthened by those who feared economic injury from American goods, and by those who cared more for the British connexion than for economic considerations. The adoption of obstruction in the House of Commons defeated the

<sup>1</sup> *Parl. Pap.*, Cd. 5516, 5523.

<sup>2</sup> See his manifesto in Skelton, *Sir Wilfrid Laurier*, i. 418-21; but he approved the action of 1911; see *ibid.*, ii. 382 f.

<sup>3</sup> This is undeniable, though Sir W. Laurier tried to explain it away (*op. cit.*, ii. 375). Cf. Egerton, *British Col. Policy in the XXth Century*, pp. 88 ff.

early passage of the Bill, and the Government, after the Imperial Conference was over, properly dissolved to seek a mandate. This was decisively refused, a majority of forty-one being changed into a minority of forty-five after fifteen years of Liberal rule.<sup>1</sup> The maritime provinces and British Columbia were largely actuated by British sentiment, Quebec was irritated, on the other hand, by the Government's alleged Imperialism in its naval policy, while the western prairie provinces with their strong American elements, and the obvious advantages in obtaining free trade in agricultural products, went strongly for the Liberals. The chief responsibility for the fiasco rested with the President, who in his turn was actuated by the desire to afford relief from the very high tariff of 1909, and to excuse his action by insisting on its political possibilities.

The outcome of this new diplomacy was not, it is clear, such as to encourage further excursions into a course of action which gave the Imperial Government or other parts of the Empire no opportunity of representing their interests to the Dominion when negotiating. On the other hand, a new departure in 1911-12 opened a fresh possibility of Dominion action. Up to that time there had been often informal conferences in which even Australian States and Canadian provinces had taken part,<sup>2</sup> but the results of these conferences were merely advisory and had no treaty effect. When this was intended, the United Kingdom was represented alone, and Dominion interests were secured by the presence in the British delegation of Dominion nominees, who took part in the final agreement, the interests of the Dominion being secured, if required, by separate arrangements for adherence and withdrawal. Thus in June and July 1911 a conference between the United Kingdom, the United States, Japan, and Russia reached an agreement on the protection of the fur seals, Canada being represented by Sir J. Pope. On the other hand, none of the Dominions took the trouble to be represented on the International Opium Conference of January 1912, which, therefore, secured the possibility of separate adherence and withdrawal.<sup>3</sup> In July 1911 a new

<sup>1</sup> A turnover of 133 Liberals, 3 Independents, and 85 Conservatives in 1908 to 88 Liberals and 133 Conservatives and Nationalists. Cf. Skelton, ii. 380 ff.

<sup>2</sup> See, e. g. *Parl. Pap.*, Cd. 6863, p. 7; Cd. 7507, pp. 8, 9.

<sup>3</sup> *Parl. Pap.*, Cd. 6038.

departure arose ; the United States Government invited Canada through the Ambassador at Washington to be represented at the International Conference on Industrial Property ; the Canadian delegates appeared ; but, as they did not agree to the proposals of the Conference, the question of their status was never raised. The Imperial delegation secured the insertion of the usual facultative clauses, and also declared that the Dominions ought to be capable of being represented with voting power in the Conference of the Union.<sup>1</sup> Much more important was the decision as to representation of the Dominions at the Radiotelegraphic Conference of 1912.<sup>2</sup> Already in 1906<sup>3</sup> at the Postal Conference of that year the question of the position of representatives of the Dominions, &c., had been considered, and the device adopted by which they had been given authority to act by the Secretary of State for the Colonies, while the British delegates were authorized to act by the Postmaster-General, and the arrangements arrived at were not treated as treaty agreements requiring ratification by the Crown. This curious procedure was not deemed possible of application to a new subject, and after full examination it was agreed that the precedent of issuing separate full powers to the representatives of the Dominions should be introduced, the four great Dominions thus taking their place side by side with the Imperial representatives, the only difference being that the full powers issued qualified their appointment by inserting the words ' on behalf of the Dominion of Canada ', &c. The procedure was followed in respect of the great conference on the safety of life at sea of December 1913 to January 1914, at which Canada, the Commonwealth, and New Zealand were separately represented.<sup>4</sup> The essence of the new system was the formal splitting up of the Crown for international purposes, and the possibility of dissent between the different parts of the Empire. Previously when there were Dominion delegates on conferences, they could only discuss, and the final decision rested with the whole body, though on occasion as at a submarine telegraph conference of 1883 the Dominion delegate might persuade his colleagues to accept a different view from that which at first seemed to

<sup>1</sup> *Parl. Pap.*, Cd. 5842.   <sup>2</sup> Keith, *Imperial Unity and the Dominions*, p. 279.

<sup>3</sup> *Ibid.*, Cd. 3556.

<sup>4</sup> *Ibid.*, Cd. 7426 ; Keith, *Imperial Unity and the Dominions*, pp. 277 ff.

prevail.<sup>1</sup> It must, of course, be remembered that the grant of full powers by the King is advised by the Imperial Government and that the ratification is equally in the hands of the Imperial Government, so that the fundamental unity of the Crown remains untouched.

#### § 4. *Other Negotiations affecting the Dominions up to 1914*

The position of the Colonies in regard to other matters of foreign negotiation during the period up to the Great War was less advanced than as regard commercial issues. The Colonies were recognized throughout as absolutely without diplomatic status of any sort. Complaints against their action must be made to the Imperial Government and only informally by Consuls, as in the case of the riots in Vancouver in 1907, when the Japanese and Chinese Governments addressed official representations to the Imperial Government, while their consular officers were in touch with the Dominion Government, and Sir W. Laurier with the Governor-General's approval sent an expression of Canadian regret through the Ambassador at Tokio to the Japanese Government.<sup>2</sup> Consular officers in the Dominions were never admitted to diplomatic status; they were merely regarded in their correct aspect as commercial agents, though Sir W. Laurier, after his commercial negotiations with them in 1910, was willing to hold that they deserved semi-diplomatic status, and might be accorded precedence. But he did not bring this up at the Imperial Conference of 1911, and efforts of Consuls in Australia and the Union of South Africa to claim the private *entrée* at the Governor-General's functions were unsuccessful. The approval of the Dominion Governments was inevitably asked for in each case of any save *consuls de carrière*, who naturally could not be obnoxious to the local governments, but the official *exequaturs* were Imperial. Needless to say, diplomatic agents were not sent to the Colonies, nor were they represented abroad by such agents, as opposed to trade commissioners or emigration agents.

<sup>1</sup> Tupper, *Recollections of Sixty Years*, p. 175.

<sup>2</sup> *Canadian Annual Review*, 1907, p. 391. Cf. Morris's *Memoir*, pp. 204 ff., 219 f., for the exaggerated view of Mr. Higinbotham as regards Imperial responsibility. For Consuls, see Canada, *Commons Deb.*, 1909-10, pp. 853 ff.; 1910-11, pp. 973 ff.



It was recognized from the first that the Colonies were bound to accept the obligations incumbent on them by treaty and to carry out their duties by appropriate executive and legislative action, as was laid down as regards commercial matters in Lord Ripon's dispatch of 28 June 1895,<sup>1</sup> and in Mr. Chamberlain's discussions with South Australia<sup>2</sup> regarding the arrest of seamen deserters, nor was the right of the Imperial Government in this regard ever challenged except to a modified extent by Newfoundland during her controversies over the French fishery rights. In 1890 the dispute as to the French rights was so acute that the Imperial Government had to conclude a *modus vivendi* without the assent of Newfoundland, though, in accordance with the promise made by Mr. Labouchere in 1857 to consult the Colony before altering the treaties affecting her, every effort had been made to secure her agreement to the proposed change. Further, as the Colony would not recognize the *modus vivendi*, a Bill was prepared to validate it, when Newfoundland gave way. In 1902, as has been mentioned, an abortive treaty was agreed on by Mr. Bond with Mr. Hay under which Newfoundland went the length of undertaking to give national treatment to all United States imports, thus preventing herself from giving a British preference, and reproducing the difficulty which the treaties of 1862 and 1865 had been denounced to avoid. Fortunately the United States declined to accept the treaty, and the Newfoundland Government retaliated in 1905 by passing an Act which would authorize the boarding and bringing into port of American fishing vessels, while it was enacted that the presence on board of bait fish, ice, lines, &c., should be *prima facie* evidence of illegal purchase within the Colony contrary to the *Bait Act*, 1887.<sup>3</sup> At the Colonial Conference of 1907 after a long debate it was agreed by the Premier with the Imperial Government that arbitration might be resorted to, and for that purpose, after failing to secure Colonial concurrence, a *modus vivendi* was concluded on 7 September 1907 to prevent unpleasant incidents pending the

<sup>1</sup> *Parl. Pap.*, C. 7824.

<sup>2</sup> See above, Part III, chap. ii; *Parl. Pap.*, Cd. 1587, p. 14; *Commonwealth Deb.*, 1908-9, p. 853.

<sup>3</sup> See *Parl. Pap.*, Cd. 3262 (1906); 3523, pp. 587-600; 3765 (1907); 5396 (1910); 6450 (1912).

arbitration. As Newfoundland declined to recognize the arbitration as justifying the *modus vivendi*, the Imperial Government issued an Order in Council of 9 September, which forbade in effect the operation of the Act of 1905, and gave the naval officers on the station the obligation of preventing any effort to defeat the Order in Council. This had Imperial statutory validity under the Act of 1819<sup>1</sup> passed to carry out the Anglo-American treaty of 1818, under which the fishery rights of United States subjects existed. The effect of the Order in Council was excellent; Canada recognized that the action taken was essential in the interests of her own relations with the United States, and the subject was not even raised in the House of Commons. Matters thereafter proceeded smoothly, and, as the result of the arbitration in which British counsels assisted to the best of their ability the cases made by Canada and Newfoundland, a Hague award very much in favour of the two Dominion Governments was achieved in 1910, and outstanding points cleared up in a Convention of 1912.

Canada showed more gravity and sense of responsibility throughout her transactions<sup>2</sup> with the Imperial Government, to whose intervention she owed in part the reciprocity treaty of 1854. Her interests and those of the United Kingdom were inextricably interwoven in the issues which were settled for the time being at Washington in 1871. Sir J. Macdonald<sup>3</sup> unquestionably thought that the British negotiators were indifferent to Dominion interests, while he was unable to resign, as he feared that even worse terms might be settled over his head. The British Government on the other hand had the *Alabama* claims to consider, and the serious friction of the years from 1866-70 when efforts had been necessary to maintain by the presence of an adequate force the respect due by American fishermen to the rights of Canada in her own fisheries. Canada again demanded recompense for the Fenian raids which had

<sup>1</sup> See 59 Geo. III, c. 38.

<sup>2</sup> The old accusations of sacrifice of Canadian interests as regards the Maine boundary in 1842 and the British Columbia boundary in 1846 should be largely discounted; see *United Empire*, ii. 683 ff.; Macphail, *Essays in Politics*, pp. 247 ff.; Henderson, *American Diplomatic Questions*; W. F. Ganong, *The Evol. of the Boundaries of New Brunswick*.

<sup>3</sup> Pope, *Sir John Macdonald*, ii. 104 ff.; Ewart, *The Kingdom Papers*, i. 65 ff.; contrast Tupper, *Recollections*, pp. 371, 391.

not been hindered by New York. Again, there was serious friction over the possession of the island of San Juan on the west coast, owing to an ambiguity in the boundary treaty which gave rise to the British claim that the Rosario Channel, the American that the Haro Channel, marked the boundary; at one time both British and United States troops were maintained on the islands in dispute, and the proposed settlement by the President of the Swiss Republic in 1869 failed to be approved by the Senate. In the ultimate issue terms which were found favourable to Canada as regards the fisheries were achieved; the German Emperor was made arbitrator on the boundary which he decided in favour of the United States, and the *Alabama* claims were settled by reference to arbitration under conditions devised to ensure the defeat of the United Kingdom, while Canada's Fenian claims were ignored. It must be remembered that at this time there was a strong section of British opinion indifferent to retaining Canada, while the United States Senate was in favour of securing the removal of the British flag from North America. The concessions made at the expense of British interests proved to be far greater than those of Canada, for which the treaty proved so advantageous that Sir J. Macdonald, who had secured its being made subject to the ratification of the Canadian Parliament, decided in 1873 to obtain that approval. In the following year a general offer to arrange reciprocity failed to attract American support, and in 1878 Sir J. Macdonald defeated the Liberal party by his new policy of high protection. The Liberals persisted in their support of reciprocity,<sup>1</sup> Sir R. Cartwright in 1887 declaring that, though he recognized the dangers to Canadian independence, he thought that the financial difficulties of the maritime provinces without free trade constituted in the highest degree a danger to Canadian unity, and in 1888 the Liberals pressed reciprocity on the Government. Sir J. Macdonald had never barred reciprocity, and had meditated it in 1869, so that his conversion to it in 1891 was not unexpected, especially as it enabled him to defeat the Liberals. They persisted naturally in the doctrine, and, when they attained power in 1896, they were able to arrange in 1898-9 for a Joint High Commission at Washington where the United Kingdom was represented by

<sup>1</sup> Skelton, *Sir Wilfrid Laurier*, ii. 368 ff.

Lord Herschell, though in 1897 the at first sight diverse policy of Imperial preference had been adopted. The Commission <sup>1</sup> came to a tentative agreement on trade, but broke down on the issue of the Alaskan boundary, and the Canadian Government eschewed for a time further consideration. But the help which the British Government gave Canada in the period from 1890-4 when Canada had unswerving support in the vexed issue of the United States claim to make the Behring Sea <sup>2</sup> a *mare clausum*, or at least to claim property in the seals of the islands which she owned even when they were on the open sea, was obliterated by the deplorable fiasco of the Alaskan Boundary arbitration.<sup>3</sup> The arrangement by which there were to be three arbitrators on each side was bad, but when the United States selected three zealous partisans who were committed to the United States case as 'impartial jurists of repute', it was clearly colossal folly on the part of the British and Canadian Governments to stick to their first selection. Canada was given the fullest opportunity to change the choice, but flung it away, and, when the English Lord Chief Justice allowed himself with deplorable folly to be induced by very poor arguments and presumably by considerations of friendship to award the United States more than she could possibly have had a right to, it is not surprising that even Sir W. Laurier on 23 October 1903 re-echoed some of the old desire for the treaty power for Canada which had been advocated by Mr. Blake on 3 October 1874 and in 1882, and that it was not until the advent to office of the Liberal Government in the United Kingdom that cordiality was restored. The presence of Mr. Bryce at Washington was marked by great success in treaty making, and on 15 December 1909 in the House of Commons Sir W. Laurier emphatically declared his dissent from the idea of sending a Canadian attaché to Washington on the score that Mr. Bryce's work sufficed for all purposes. In January 1911 he again eulogized his services. The treaties concluded

<sup>1</sup> Skelton, *Sir Wilfrid Laurier*, ii. 126-34. There were four Canadian negotiators headed by Sir Wilfrid Laurier.

<sup>2</sup> *Parl. Pap.*, C. 6918-22, 6949-51, 7107, 7161 (1893-4); 7836.

<sup>3</sup> *Parl. Pap.*, Cd. 1400, 1472 (1903); 1877, 1878 (1904); 3159; Ewart, *Kingdom of Canada*, pp. 299 ff.; *Commons Deb.*, 1903, p. 4815; Skelton, ii. 135 ff.; *Canadian Annual Review*, 1903, pp. 346 ff. Lord Alverstone's defence was palpably idle, and as regards the islands it is incredible that he can really have decided judicially; to say so is to condemn him as incredibly stupid.

were of high value, the Arbitration Treaties of 1908 and 1911; the Boundary Waters Treaty of 1909; the Fisheries Arbitration Treaty of the same year; the Passamaquoddy Bay Treaty of 1910; the Pecuniary Claims Treaty of 1911; and the Pelagic Sealing Treaty of 1911, in which, besides the United States, both Russia and Japan were vitally concerned. The Arbitration Treaty of 1908 was made to contain an interesting recognition of the Dominions. In view of the right of the Senate to pass on each proposal for arbitration under it in the form of agreeing to the formulation of the issue, the Imperial Government secured the insertion of the necessity of the assent of the Dominion concerned to any reference affecting it, and this precedent was adopted in the Pecuniary Claims Treaty of 1911, while in the subsequent Treaty of 1914, providing for a Peace Commission to investigate questions arising between the two countries, power was taken to change the British representative on the Commission if the matter at issue affected a Dominion, while of course the formal assent of the Dominions to the terms of the treaty itself was obtained. In the Boundary Waters Treaty of 1909 a very interesting clause was inserted, under which

any questions or matters of difference arising between the high contracting parties involving the rights, obligations, or interests of the United States of America or of the Dominion of Canada either in relation to each other or to their respective inhabitants may be referred to the International Joint Commission by the consent of the two parties, it being understood that on the part of the United States any such action will be by and with the advice of the Senate and on the part of His Majesty's Government with the consent of the Governor-General in Council.

The body referred to was the tribunal set up under the treaty to deal with issues affecting the boundary waters of the two countries, and the new clause offered an excellent opportunity of which full advantage has been taken to settle disputes amicably, in a simple manner, between Canadian and United States representatives.

On the whole, it may be admitted that British diplomacy during the period to 1911 did not serve Canada badly. The bitter controversies over the treaties of 1842 regarding the Maine boundary and that of 1846 regarding the boundary of

British Columbia refer to the period before responsible government was fully operative, and recent research has really established that in both cases British negotiators made not a bad stand for the interests of Canada, and the severe censures which have been passed on the British attitude from 1866-71 are somewhat unwise, having regard to the fact that the United States was full of war veterans, while Canada was without serious means of defence and communications were too poor to allow of the United Kingdom affording effective aid. Doubtless the attitude of Britain during the earlier stages of the War of Secession and the hatred felt towards her by the Fenians added to the dangers of Canada; on the other hand, as a distinct state her life would have been worse than precarious, as the experience of Texas sufficiently proves.

In the case of Australia the question of treaties arose in a rather curious manner in 1870<sup>1</sup> when a Commission on federation of Victoria took up the issue. There was at that time a strong feeling in Australia that the British Government by insisting on recalling her forces, seeing that the Colonial Governments were no longer willing to pay for them, was abandoning them to danger, and the menace of Russia happened to be specially strong, being estimated as far more serious than it really was. The Commission denounced the position of the Colonies; they were defenceless, yet liable to be involved in British wars, and from reasons of distance they could not look for adequate protection. They suggested, therefore, that the great Colonies should be given the right of concluding treaties,<sup>2</sup> which would make them sovereign States and enable them to remain neutral in the case of a British war; or if they preferred to take sides, their intervention would be the more impressive as it would be voluntary. There was no idea of disowning the sovereignty of the Crown, but the aim was to secure a recognized neutrality through the concurrence of foreign powers, whose attitude of generosity towards privateering and merchant ships indicated a spirit which would lead to the concession of the

<sup>1</sup> *Parl. Pap.*, 1870, Sess. 2, ii. 247; contra Higinbotham, *Deb.*, x. 690 ff.

<sup>2</sup> For Canadian discussions see *Commons Deb.*, 1882, p. 1075 (Blake); 1887, p. 376; 1889, pp. 171-94 (Cartwright); 1892, p. 1123 (Mills); Laurier, *Deb.*, 1907-8, p. 1260; 1909, p. 1980; Borden and Tupper, *Canadian Annual Review*, 1903, pp. 325-30; Willison, *Sir Wilfrid Laurier*, i. 206 ff.

Colonial suggestion. The matter never went far, despite the almost complete unanimity of the Commission, for it was generally disapproved by the Colonial Governments, and it was felt that the danger of failure of British aid was exaggerated. Moreover, before the idea would obtain popularity, the people of Australia became painfully aware that the French policy of sending convicts to the Pacific was opening up dangerous possibilities, in which they would require Imperial aid if they were to achieve any results. The Colonial Governments then came to adopt the more natural attitude of demanding the impossible or possible from the British Government, and complaining when they could not achieve the former. Still, a good deal was done. The Colonies asked for the annexation of Fiji, and, though on being asked New South Wales alone was willing to contribute its share to a total of not above £4,000 a year for expenses,<sup>1</sup> the Imperial Government faced the cost, and annexed the islands. In 1875<sup>2</sup> New South Wales, South Australia, and Queensland raised the question of the wisdom of annexing New Guinea, but in his reply Lord Carnarvon on 8 December pointed out that the result of doing so would merely be to further Australian as opposed to Imperial interests, and that it would be impossible for the Imperial Government to place the burden on the British people, if the Colonial Governments did not think it was worth while their paying for the annexation. The Colonial press agreed that the proposal that the United Kingdom should annex at her own cost was rather absurd, and the Victorian Government was satisfied to leave the matter in Imperial hands, feeling sure that their Parliament would not care to vote funds. Moreover, as Lord Carnarvon pointed out, the establishment of the High Commission for the Western Pacific under the *Pacific Islanders Protection Acts*, 1872 and 1875, had shown practical interest in the matters at stake, and the United States and Germany at that period had no Colonial ambitions. In 1883<sup>3</sup> matters had changed with German ambi-

<sup>1</sup> *Parl. Pap.*, C. 1566, App., pp. 85 f.; Quick and Garran, *Const. of Commonwealth*, pp. 637 ff.

<sup>2</sup> *Ibid.*, C. 1566; Rusden, *Australia*, iii. 603 ff.

<sup>3</sup> *Parl. Pap.*, C. 3617, 3691, 3814 (1883); 3839, 3863 (1884); 4217, 4273, 4441, 4584 (1884-5); 4656 (1886); 5564 (1888); Dilke, *Problems of Greater Britain*, i. 437 ff.; Bernays, *Queensland Politics*, pp. 92 ff.; G. H. Scholefield, *The Pacific* (1919), pp. 126 ff.

tions, and Queensland purported to annex the territory. The British Government refused to accept the proposal, and Germany then took advantage of the extreme danger produced by the Egyptian situation to risk British indignation by effecting an unexpected annexation. The United Kingdom and Germany and the United Kingdom and the Colonies then indulged in futile recriminations, and belatedly the Dominions took the common-sense step of finding the money to justify the annexation of what was still left by the United Kingdom. It may be noted that, at about the same time as New Guinea was lost, South-West Africa fell into the power of Germany because the Cape Government had delayed through negligence and a change of ministry to give the necessary assurance to the United Kingdom of willingness to bear the cost of administration.<sup>1</sup>

The New Hebrides<sup>2</sup> caused further difficulties; by 1878 France had sufficient interests to render recognition necessary; this was repeated in 1883 and more definitely in 1887, while the French policy of colonizing New Caledonia with exiled criminals roused fierce anger in Australia and led Mr. Deakin and some of his friends to plan an armed attack on France, which would have been suicidal, and which throws a painful light on the immaturity of the mental outlook of even the best-read Australian of the day, and his inability to understand foreign politics. The same thing had been shown in the quite impracticable suggestion of neutrality in 1870 which was of course in part at least dictated by Mr. Gavan Duffy's hatred, as an Irish patriot, of the English. Samoa<sup>3</sup> also was an object of interest, especially to New Zealand, which ineffectively sought to legislate to provide for inquiry as to federation or annexation in the Pacific in 1883. By the Anglo-German treaties of 1886 Samoa with Tonga and Nive were left neutral, while Germany obtained the Northern Solomons and the Caroline and Marshall Islands, the United Kingdom the Southern Solomons. But in

<sup>1</sup> *Parl. Pap.*, C. 4190 (1884); 4262, 4265, 4290 (1884-5); 5180 (1887); Molteno, *A Federal South Africa*, pp. 82 ff.; B. Williams, *Cecil Rhodes*, p. 77. Rhodes was in part to blame.

<sup>2</sup> *Parl. Pap.*, Cd. 3288, 3525, and 3876. See also Cd. 5323, pp. 548-63 (conference debate).

<sup>3</sup> *Parl. Pap.*, C. 9506; Cd. 7, 38, 39, 98. Scholefield (*The Pacific*, pp. 177 f.) does not realize the suddenness of the crisis.



1899 the temptation of the South Africa War and the British reverses of the blackest week of the war proved too much for the German Emperor. He suddenly became convinced that popular clamour was overwhelming—as indeed it was, having been instigated in the best official manner—and that the United Kingdom must abandon its claim on Samoa. The Imperial Government remained cool ; it succeeded in obtaining in return the cession of the Northern Solomons and of German claims to Tonga and Nive, and it was merely lack of appreciation of the danger of the situation in which the German attitude placed the United Kingdom that induced vehement and violent protests by Mr. Seddon, to whom Germany meant little. As late as 31 October 1903 Mr. Lyttelton had to protest against the assertion that Australian interests had been overlooked in the matter of Samoa, reminding the Commonwealth Government that in deference to Australian wishes, Fiji, 88,000 miles of New Guinea near Australia, the Solomon Islands, the Gilbert and Ellice Islands, the Cook Islands and many others, had been added to the Empire all at British expense. The suggestion that surrenders of territory elsewhere should be made was dismissed as involving utter injustice to the other parts of the Empire concerned. None the less, despite the excellence of the British case it was a lamentable blunder on the part of the maladroit Lord Elgin when in 1906 a new Convention was arranged regarding the New Hebrides without consulting the Dominions in advance. Copies of the Convention were sent to Australia and New Zealand on 9 March 1906, and evoked strong protests in dispatches of 14 June and 21 July, but on 4 October Lord Elgin stated that new interests, not French or British, were being created, and that the Imperial Government had asked France to agree to a joint protectorate coming at once into force, but that France demanded approval of the Convention as agreed on. He asked, therefore, an indication of Dominion wishes ; neither Government could commit itself in the circumstances, and the Convention was confirmed. The condominium it set up was about the worst form of government ever invented by two civilized powers, and it is not surprising that Lord Elgin's precipitate action came in for much unanswerable criticism at the Conference of 1907, while Australia sensibly declined even to help in drafting the detailed application of the

deplorable Convention. It was further tinkered with in 1914,<sup>1</sup> and remained in 1926 a source of unending discredit to both France and the United Kingdom, the only sensible suggestion remaining that of Mr. Massey, who urged, like his predecessor, partition in the interest of the unhappy natives. It is characteristic of the curious fatuity with which the matter was handled even in 1914 that, though the Dominion Governments were not ignored as regards the new Convention to be arranged, they were not asked to send negotiators who might then have acquired first-hand knowledge of the impossibility of any arrangement with France.

The other point of chief interest to the Australian colonies in their earlier years of self-government was that of a customs union, which involved the treaty power; this will more conveniently be noted later.

In South Africa also there were difficulties in adjusting the views of the Cape and Natal, after responsible government, and the Imperial Government, as regards relations with the still unconquered natives, and with the Boer republics. They came to a head, as has been seen, in the quarrel between Sir Bartle Frere and Mr. Molteno as regards the attitude of the Cape towards federation and other topics, but the only serious issues were those arising from the success of Germany in securing South-West Africa, and in this the chief share of the blame was clearly South African.<sup>2</sup> There was a certain measure of conflict between the ideal of the Cape to expand, and the doubt of the British Government as to the wisdom of expansion, while a certain solution of serious problems was afforded by the genius of Rhodes and the creation of the South Africa Company. The Boer War, however, raised an extremely curious question: could the Cape remain neutral in the war? Some of Mr. Schreiner's ministry would probably have liked this course to

<sup>1</sup> Protocol, 6 Aug. 1914; Cmd. 1680. See also Cmd. 1827. The failure to achieve a settlement during the Paris Conference was one of many blunders of British diplomacy, and the same observation applies to the failure to secure concession in return for the remission of French debts in the settlement with M. Caillaux in 1926. See Colonial Office Annual Report No. 1273 (1924). Cf. Cd. 3288, 3525. It is fair to note that British interests were sacrificed by the high tariff of Australia on exports, while France aided her settlers by drawbacks and subsidies.

<sup>2</sup> Walker, *Lord de Villiers*, pp. 180 ff.

be adopted, but it was from the first absolutely clear, as Sir H. de Villiers showed, that the idea was absurd, and the Boers themselves made assurance doubly sure by invading the Cape in force, and in some cases at least purporting to annex territory to the Orange Free State. It was freely alleged against Sir Wilfrid Laurier in the debates on the Naval Bill of 1910 that he had declared that Canada could remain neutral in a British war. The accusation was unjust ;<sup>1</sup> he had merely asserted the obvious truth that Canada must be free to decide how far she would give assistance actively in any war, a doctrine equally maintained by Australia,<sup>2</sup> which insisted on retaining in her own hands the power to decide to place her naval forces under the British Admiralty. When it was revived by the *Volksstem* <sup>3</sup> in South Africa in 1911 as a result of misunderstanding of the attitude of Sir W. Laurier at the Conference, it was immediately repudiated by General Botha as quite contrary to international law.

In all these cases the issues under examination were essentially matters differentially affecting the Dominions. The idea of the Dominions taking any part in general policy was absent ; the Governments overseas were not anxious to be burdened with responsibility, and the Imperial Government was not willing to cumber its action by discussions with the Colonial Governments. Thus the Hague Conventions of 1899 and 1907 were accepted without reference to the Dominions by the Imperial Government, though both contained clauses, to carry out which in the Dominions required changes in local law. Similarly the arrangements to secure the maintenance of the *status quo* in the North Sea and in the Mediterranean, the General Act of Algeciras of 1906, and many other arrangements were concluded without any idea of asking Dominion views. The great reconciliation with France in 1904,<sup>4</sup> marking a new orientation of British policy, was arranged without consulting any Dominion, though the special parts affecting

<sup>1</sup> *Commons Deb.*, 1909-10, pp. 1733 ff., 2952 ff., 4139 ff., 4316 ff., 4413 ff., 7528 ff. ; 1910-11, pp. 57 ff. ; *Parl. Pap.*, Cd. 5745, p. 117. Cf. his attitude in 1899 to the Boer War, Skelton, ii. 91 ff.

<sup>2</sup> *Parl. Pap.*, Cd. 4288 ; *Deb.*, 1910, pp. 4728 ff.

<sup>3</sup> See Botha, *The Times*, 28 July 1911 ; *Morning Post*, 3, 8, and 16 Aug. 1911.

<sup>4</sup> *Parl. Pap.*, Cd. 1952, 2095 (1904) ; 2383 (1905).

Newfoundland were duly made the subject of agreement with that Government, an instance bringing out the character of the rule as to consultation as then understood. The later *entente* of 1907 with Russia, effecting a vital change in British policy, was never discussed at all with the Dominions, while the first Japanese Alliance was treated in the same way. But the Hague Conference of 1907,<sup>1</sup> resulting, as it did, in the decision to summon a Naval Conference at London in 1908, which determined on the Declaration of London,<sup>2</sup> roused at last deep interest in the Dominions, where English discussions of the rules of contraband and seizure of property at sea awakened keen anxiety among peoples deeply concerned in oversea export trade. The result was that Australia decided to raise the issue at the Imperial Conference of 1911, and so inaugurated a new chapter in the history of the Empire.

#### § 5. *The Imperial Conference of 1911 and Co-operation in Foreign Policy*

The Australian delegates at the Imperial Conference of 1911<sup>3</sup> explained clearly that their criticism was due to the fact that the Declaration of London had been arranged without their having any opportunity even of making representations as to its terms. Their concrete critiques rested on the usual points, the recognition of food as conditional contraband; the possibility of sinking of neutral vessels by belligerents; and the rules as to conversion of merchant ships into men-of-war. Sir W. Laurier was insistent on the view that the Conference must not demand from the Imperial Government consultation on issues of foreign policy as a matter of right, for that would involve the Dominions in the admission that they were bound automatically to put their forces at the disposal of the United Kingdom in time of war, which was not the case,<sup>4</sup> but he did not disagree with the principle that consultation in such cases as those of preparations for Hague Conferences was appropriate, and this view was shared by the other members of the Con-

<sup>1</sup> *Parl. Pap.*, Cd. 3857, 4081, 4174, 4175 (1908).

<sup>2</sup> *Parl. Pap.*, Cd. 4554, 4555 (1909); 5418 (1910); 5718 (1911).

<sup>3</sup> *Parl. Pap.*, Cd. 5745, pp. 97 ff. Cf. Cd. 4554, 5418; *Lords Deb.*, 8, 9, 13 March; Cd. 5746-1, pp. 4-20.

<sup>4</sup> Cf. Skelton, ii. 91 ff. (1899), 343 f. (1911).

ference. They accepted as perfectly valid Sir E. Grey's explanation of the failure to consult the Dominions regarding the Declaration of London as due to the fact that they were not consulted regarding the Hague Conference of 1907, and that the Declaration arose out of an attempt to lay down the code of law to be applied by the Prize Court, whose establishment was resolved on at the Conference, and whose value, as replacing purely national decisions, was of great account. It was finally agreed that the Conference cordially welcomed the proposal of the Imperial Government

(a) that the Dominions shall be afforded an opportunity of consultation when framing the instructions to be given to British delegates at future meetings of the Hague Conference, and that conventions affecting the Dominions provisionally assented to at that Conference shall be circulated among the Dominion Governments for their consideration ; and (b) that a similar procedure, when time and opportunity and the subject-matter permit, shall as far as possible be used when preparing instructions for negotiation of other international agreements affecting the Dominions.

The resolution, of course, as General Botha made clear, had no relevance to the long-established practice of consultation with any Dominion on issues immediately affecting it ; it referred to the wider sphere of treaties of general application, and did not touch the ordinary conduct of foreign policy. But the Conference agreed, Australia alone abstaining from voting though not dissenting, to approve the Declaration of London as marking a great advance on earlier conditions, a view which unhappily the Great War disproved.

Close contact with Imperial foreign policy was also achieved by the consideration at a meeting at the Committee of Imperial Defence of the renewal of the Anglo-Japanese Alliance. The exposition of British foreign policy there given by Sir E. Grey convinced the most reluctant of Dominions that it would be suicidal to drive Japan out of close co-operation with the United Kingdom, and the alliance was renewed with their full assent. Moreover, Mr. Fisher showed a keener sense of the trend of events than his colleagues when, in discussing the future of the Colonial Office, he suggested that it should be placed under the Secretary of State for Foreign Affairs, indicating that the relations of the Dominions and the Imperial Government were,

in fact, already diplomatic, and that the deepest interest of the Dominions was to be kept in touch with foreign affairs. But his view then was premature and evoked no serious consideration. The Conference, however, on the motion of Sir W. Laurier, agreed, as already noted, to recommend further efforts to secure the right of the separate withdrawal of the Dominions from general treaties by which they were bound, on the score that most favoured nation clauses had compelled Canada to extend to Argentina, Austria-Hungary, Bolivia, Colombia, Denmark, Norway, Russia, Spain, Sweden, Switzerland, and Venezuela the concessions made under her treaties as to France. But no suggestion was made to effect any change in treaty procedure generally.

It was further agreed that the Committee of Imperial Defence should be used as a means of keeping the Dominions in touch with wider aspects of defence, and that when matters which interested the Dominions were under discussion at that Committee, steps should be taken to secure the attendance of Dominion representatives, while in each Dominion a Defence Committee should be set up, which it was contemplated would co-operate with the Imperial Defence Committee in devising homogeneous schemes of defence. In Canada, the election of 1911 saw the utter defeat of the Liberals, and when Mr. Borden, the new Prime Minister, came to the United Kingdom in 1912, it was necessary to explain to him the whole aspect of foreign politics on the lines adopted in the case of the Prime Ministers in 1911.<sup>1</sup> Mr. Borden then homologated the idea of the proposed use of the Committee, and found no difficulty in holding that a member of the Dominion Cabinet could easily spend some months yearly in England in order to take part in Committee meetings. He desired also that such a minister or other members of the Cabinet might, when in London, be given in confidence full information on foreign affairs and Imperial policy. To this no exception was taken ; indeed on 15 March 1910 Lord Crewe had suggested that the Dominions should take a greater interest in Imperial problems and diplomacy, and had urged co-operation and common action in all these matters. It was, of course, made clear that the Imperial Cabinet must decide all questions of policy, and that the Committee must be merely

<sup>1</sup> Keith, *Imperial Unity and the Dominions*, pp. 322 ff.

advisory, but any Dominion Minister resident in London would always be afforded access to the Prime Minister and the Foreign and Colonial Secretaries for information on public affairs. The scheme was apparently accepted by Mr. Borden, for it explains his action on 5 December 1912 in asking the Canadian Parliament to grant 35 million dollars for naval defence of the Empire, and on 10 December it was suggested to the other Dominions, while at the same time an offer was made to vary the procedure in any way to meet the wishes of any Dominion. The scheme was in advance of the feeling of the Dominions. Australia on 19 December 1912 suggested in lieu a special Naval Conference to meet in a Dominion, in January or February, which was ruled out as impracticable, as the other Dominions neither could nor would attend. South Africa held that general issues of foreign policy must rest with the Imperial Government, in those affecting especially any Dominion it must be consulted, but it was needless to seek to keep by means of a resident minister in close touch with general issues. For special purposes visits might take place to confer with the Committee of Imperial Defence or British ministers. New Zealand also did not favour permanent representation, and Newfoundland naturally did not consider special representation needful. New Zealand and South African ministers in point of fact visited London in 1913 to confer on matters of defence.

In view of the probable convening of another Hague Convention the question was raised by the writer in 1914 whether an effort should not be made to secure for the Dominions special representation at the Hague Conference, on the score that this would be a legitimate recognition of the status of the Dominions. Such a course of action was objected to on the ground that the assent of foreign powers would be requisite, but it was clear that, if the British Government chose to press the matter, that assent could have been attained, as it was in 1919 for much more pressing matters. It was also contended that the distinct representation of the Dominions would seem to indicate a breaking up of the unity of the Empire, to which the reply obviously was that the unity had already been broken up in the case of the Radiotelegraphic and Safety of Life at Sea Conferences,<sup>1</sup> and that the national spirit of the Dominions

<sup>1</sup> When this matter was settled with the Foreign Office, I felt that that

could not acquiesce indefinitely in a lower status than minor powers in or out of Europe. It was, of course, obvious that there must be unanimity in the Empire on matters of peace or war, such as rules as to belligerency, but it was thought that unanimity would in the long run be as easy to obtain if the Dominions were formally represented as if they were kept in a position of tutelage. But it was recognized that it was, if not necessary, at least legitimate to wait for any proposal to this effect from the Dominions, and, as the Dominions then were one and all intent on the policy of concentration on domestic issues, no action was taken, and the outbreak of war brought new issues into operation. Canada, however, on the death of Lord Strathcona, its venerable High Commissioner, by appointing a minister to perform his duties for the time being, took the first step towards adopting the policy of having a resident minister in the United Kingdom under the new scheme.<sup>1</sup>

### § 6. *The Great War and the Status of the Dominions*

Under existing conditions the Dominions had no responsibility whatever for the diplomacy which led up to the Great War, and they were involved in hostilities within a few days after the urgency of the crisis had become obvious to the Governments from the press.<sup>2</sup> It was fortunate in the extreme that the necessity of vindicating Belgium so appealed to the Dominions that assurances of support in any necessary measures were forthcoming at once, and that spontaneous offers of aid flowed in the moment it was seen that a struggle was inevitable. The Dominions had, under the constitutional law of the Empire,

department at least did not fully realize the momentous character of the change, which was adopted much more readily than any other important reform in Imperial relations known to me, and wholly on Imperial initiative.

<sup>1</sup> Sir Charles Tupper, indeed, by retaining for a time the Ministry of Railways while acting as High Commissioner, combined Cabinet membership and representation of Dominion interests in London, but Sir W. Laurier's Government made the High Commissionership essentially non-political.

<sup>2</sup> Keith, *War Government of the Dominions*, chaps. ii and iii. Lord Haldane's unexplained failure to warn the Dominions and their people of the dangers of the situation, and Sir E. Grey's failure to consult even South Africa as to his proposed treaty with Germany in 1913-14, are properly open to censure; cf. Egerton, *Brit. Col. Policy in the XXth Century*, pp. 120 ff.; Keith, *The Belgian Congo*, p. 168.



an absolute right to remain outside the conflict as far as active participation as opposed to self-defence was concerned, but, in lieu, they put themselves immediately to work to afford the most active aid possible. The Imperial Government for its part throughout the war put no pressure on them ; it left it entirely to them to decide whether there should or should not be adopted compulsory service, and the extent of the forces to be used. It did suggest to them that operations against the adjacent territories might be undertaken, but left them absolutely at liberty to decide if they would so act. Necessarily the war prerogative involved the doing of matters affecting the Dominions, such as the declaration of days of grace, the defining of the law to govern contraband, the issue of reprisals Orders in Council, and so forth, but no effort was made to apply to the Dominions the new laws as to trading with the enemy ; compulsory service was not imposed on persons normally resident in the Dominions ; and in the conventions made with allied States for compulsory military service Dominion residents were similarly excluded in cases where no compulsion had been adopted in the Dominions of their normal abode. The diplomacy of the war, on the other hand, remained in British hands, for a proposal of the Commonwealth Government in December 1914 to summon the Imperial Conference was not welcomed by the other Dominions, and the Imperial Government had to content itself with giving an assurance of full consultation, personal if possible, with the Dominions before peace conditions were agreed on, a promise the more necessary because in asking the Dominions whether they would attack the adjacent German territories the Imperial Government had made it clear that the future disposal of such territories must depend on the final outcome of the war. Sir R. Borden, however, visited England in July 1915 and conferred with the Imperial Government, being invited to attend the Cabinet, an unprecedented honour, and the same treatment was meted out to Mr. Hughes in the following year, who *en route* to England had a similar compliment paid to him in Canada. He was also, with the aid of Sir G. Foster, who represented Canada at the Allied Conference at Paris in June 1916, to share in shaping the policy of the resolutions as to trade then arrived at. Sir J. Ward and Mr. Massey also visited London later in the year, though Canada alone, in Sir G. Perley

and later Sir E. Kemp, maintained continuous touch with the Imperial Government.

The creation of the Imperial War Cabinet of 1917-18, which will later be discussed, led to a participation of the Dominion Governments in the task of forming the diplomatic as well as the war policy of the Empire, and inevitably the advent of the armistice was followed by the transformation of the War Cabinet into the British Empire delegation to the Peace Conference. An unfortunate contretemps had occurred regarding the armistice terms; they were accepted without troubling to consult Mr. Hughes, who was then in London, no reason being available even to throw a semblance of excuse over the neglect, though in point of fact the omission was hardly productive of serious inconvenience. Sir R. Borden then took the lead in demanding on 29 October 1918 the formal representation of Canada at the Conference,<sup>1</sup> and in this demand he had the warm support of Mr. Hughes, though not of the Commonwealth Cabinet, which was in effect overruled by its imperious head, and of General Smuts, Mr. Massey being decidedly cold. The British Government demurred for a time, but Sir R. Borden pressed the matter on 4 December, and the objections of the Allied Powers were at last overcome. The objections were, in point of fact, absurd; Canada, Australia, New Zealand, and the Union had done infinitely more to support the Allied cause than any of the Powers assembled, except the Great Powers themselves, and the idea that they must be content with panel representation on the British delegation of five arranged for in advance by the Supreme War Council, consisting of the Prime Minister and one minister of each of the Western Allies, constituted in February 1918, was manifestly absurd. In the final arrangement, while the panel system remained available for the British Empire, now recognized for the first time as a contracting party *eo nomine*, the Canadian, Australian, South African, and Indian Governments were allowed two representatives apiece and New Zealand one, with the same right of appearance and audience as the minor Powers. One concession was made to foreign objections; if there were any

<sup>1</sup> Separate representation based on the precedents of the Radiotelegraphic and Safety of Life at Sea Conferences of 1912 and 1913-14 was strongly suggested by the writer in 1916; see *Canadian Law Times*, xxxvi. 856.

formal voting, the British Empire delegation alone was to vote, a matter of purely formal interest, voting being of no consequence. The actual work of the Conference, first dealt with by a Council of Ten, fell in fact into the hands of four, President Wilson, Mr. Lloyd George, M. Clemenceau, and Signor Orlando, the Japanese Government disinteresting itself in European affairs, and the Dominions exercised their influence as members of the British Empire delegation in guiding the decision of the British Prime Minister as its head. Members of the Dominion delegations served on the various commissions to which certain issues were entrusted for report, thus Sir R. Borden dealt with Greece, Mr. Sifton with international waterways, Sir J. Cook with Czecho-Slovakia, Mr. Hughes with reparations, General Botha with Poland, and Mr. Massey with war responsibility. Difficulties arose regarding the question of the new League of Nations, but the Dominions were steadily persistent—though Mr. Massey had grave doubts which later hardened into regret—and the Covenant finally allotted them independent votes in the Assembly. Moreover, a vital point was gained by the admission of Mr. Lloyd George, M. Clemenceau, and President Wilson, that the effect of Article IV of the Covenant was to permit the Dominions to be selected either for permanent or temporary membership of the Council, if that body and the Assembly should at any time see fit. Yet again a conflict arose as to the Labour clauses of the treaties of peace; the Commission on this issue reported on 11 April 1919 advocating that the Dominions should be entitled to send members to the General Conference, but denying them rights or representation by Government nominees on the Governing Body. Sir R. Borden<sup>1</sup> insisted on having this anomaly removed.

A new mode of signature was adopted in order to record the new status of the Dominions.<sup>2</sup> In the list of the High Contracting Parties in the treaty with Germany appeared the British Empire, forming along with France, Italy, Japan, and the United States the group of the Principal Allied and Associated Powers, and as representative of the King of the United Kingdom of Great Britain and Ireland and of the British

<sup>1</sup> *Canadian Constitutional Studies*, pp. 160 f.

<sup>2</sup> In addition to Keith, *War Government of the Dominions*, chap. vii, see Keith in *History of the Peace Conference of Paris*, vi, chap. iv.

Dominions beyond the Seas, Emperor of India, there signed Mr. Lloyd George and four British representatives, while the Dominion delegates signed for the Dominions concerned as representatives of the Crown. The same form was adopted in the peace treaties with Austria, Bulgaria, Hungary, and Turkey, and in the treaties with the newly extended States of Czecho-Slovakia, Greece, Poland, Rumania, and the Serb-Croat-Slovene State, in the conventions regarding Italian reparation payments, the cost of liberating former Austro-Hungarian territories, the trade in arms and ammunition, the liquor traffic, and the revision of the Berlin Act. A distinction, however, was made in the case of the Anglo-French convention of 28 June 1919 for the defence of France against German aggression, which was to become operative only if a similar convention entered into by the United States with France became operative. That was signed for the King by two British ministers only, but by Article V it was expressly provided that 'the present treaty shall impose no obligation on any of the Dominions of the British Empire unless and until it is approved by the Parliament of the Dominion concerned'. This was due to the difficulty of the Dominion Premiers pledging themselves to the immediate and effective aid required by the terms of the Convention. But even in the other cases the essential unity of the Empire was preserved by the fact that not only did the Dominion signatures appear under the head of the British Empire, but the full powers to sign were issued by the King on the advice of the Imperial Government through the Secretary of State for Foreign Affairs, though of course at the request of the Dominion Government. The formal request for the issue of full powers was made by Canada in an Order in Council of 10 April 1919, the general procedure having been agreed on by the Dominion representatives in a memorandum of 12 March 1919. Sir R. Borden seems to suggest that as the full powers bear no counter-signature they may be deemed to rest on the Order in Council, but, of course, this is an utterly untenable view. Full powers cannot be issued save under a warrant which must be signed by the King and countersigned by the Secretary of State for Foreign Affairs as authority for the affixing of the Great Seal, and the Great Seal could clearly not be affixed save on Imperial authority. The same observation

applies to ratification, the instrument of which must be signed by the King and countersigned by the Foreign Secretary.<sup>1</sup>

There remained the question of ratification, and the Imperial Government rather absurdly asked the Dominions, through Lord Milner, to whom the Dominions were still colonies, to consent to this without the approval of their Parliaments. Sir R. Borden on 9 July and 4 August naturally declined outright to assent, demanding that he be allowed to submit the treaty with Germany to his Parliament. Reason prevailed, and this was duly done by all the Dominions, the ratification for the Empire then being expressed by the King under the Great Seal of the United Kingdom as usual.

At the Conference the substantial aims of the Dominions were securing retention of the former German territories, which after much controversy was finally conceded under the mandatory form, which was decidedly a disappointment to all the Dominions; moreover, Australia resented the ascription of the Caroline and Marshall islands to Japan, though the latter Power was obviously, in view of her great services in the war, entitled to keep them. Efforts—half-hearted—to secure the cession of St. Pierre and Miquelon naturally failed, as did those to secure renunciation of French rights in the New Hebrides. Mr. Hughes was especially eager to secure in reparations the refund of Australia's war costs; punishment of German officials who had ill-treated Australians; seizure of German property in New Guinea and of the proceeds of German property in Australia. General Smuts' chief work was in regard to the League of Nations, though the final result differed in vital points from his suggestions.

### § 7. *The League of Nations and Dominion International Status*

The effect on the Dominions of the mode of negotiation of the treaty of peace and entry into the League of Nations was much discussed in the Dominion Parliaments in 1919,<sup>2</sup> and has

<sup>1</sup> The idea that a Secretary of State in such matters is an office-boy for a Dominion Government is ludicrous, and is mentioned here merely because it appears to be regarded as even conceivable by writers who clearly do not understand the spirit of our Constitution. Smith (2 *Can. Bar Review*, 237) holds that a constitutional convention to this effect may exist, but Mr. King's view of 20 March 1923 is misinterpreted.

<sup>2</sup> Keith, *War Government of the Dominions*, pp. 155 ff. See also Rolin, *Revue*

since been variously estimated, nor in fact is it possible with any confidence to say what has been the effect. The Liberal party in Canada, then in opposition, was specially contemptuous of the value of the new status, which was, in their view, absurd to predicate of a Dominion which could not even alter its own constitution. Mr. Doherty, on the other hand, actually declared that the separate signature for the Dominions was essential, as the Imperial Government had lost the right to bind the Crown in any other way. The theory was obviously contradicted at once by the Anglo-French convention for the defence of France, and a large number of treaties renewing arbitration conventions, as well as the host of commercial and extradition treaties, have since been signed, for the whole Empire,<sup>1</sup> by Imperial representatives alone. The most difficult point to be faced was Article X, which raised much anxiety in Canada from the point of view of the possibility of Canada being involved in responsibility for guarantees of European territory. Mr. Doherty pointed to Article V, which made it clear that, if Canada were asked to take any action, she would have to be invited to send a representative to the Council, and as decisions by the Council had to be unanimous, if she dissented, she could not be called upon to act in any way. He did not disclose what later came to light, that Canada had vehemently objected to the whole system of Article X, urging that a guarantee of territorial arrangements which Canada had not settled was unfair, and should be left to the Powers in Europe who in fact settled the terms of peace. Mr. Doherty's apologia in fact made nonsense of Article X. On 11 March 1920 Mr. Rowell defended the League from the United States criticism on the score of six British votes by maintaining that it had been definitely understood that, if a dispute arose between any part of the Empire and a foreign country, and if the issue, not being suitable for arbitration or judicial settlement, were referred to the Assembly for investigation and report, the other

*de droit international*, 1923, pp. 195-226 ; Baty, 41 *C. L. T.* 677-704 ; Harrison Moore, *J. C. L.* viii. 21-37 ; Allin, 10 *Minn. Law Rev.* 100-22 ; Lewis, *B. Y. B. I. L.*, 1925, pp. 30 ff.

<sup>1</sup> These treaties all render their actual application to Dominions, Colonies, or mandated territories or protectorates facultative, i. e. they assume that a Dominion is exactly in the same international position as a Colony.

parts of the Empire would not be entitled to vote on the matter, as being interested parties. Otherwise he refused to recede from the status acquired. In the Commonwealth singularly little attention was paid to the constitutional aspect, in the discussions on 10 September 1919; the Labour party flatly said that the Imperial Government would in any case ratify, and it mattered nothing what Australia desired. In New Zealand the new status was coldly received, Mr. Downie Stewart raising doubts as to the effect of the new scheme on the unity of the Empire. In the Union of South Africa General Smuts on 8 September 1919 and subsequently insisted that the League had solved the problem of autonomy and Empire union, by assuring to the Dominions a status which they could accept without loss of self-respect. He insisted strongly but quite wrongly<sup>1</sup> that the Dominions were now *de jure* independent of the United Kingdom, the Parliament of that territory having lost the right to legislate for the Union, and the Crown to disallow any Union Act save indeed one conceding independence, a safeguard necessary to counter the painfully pertinent inquiry how a State could have independent status in the League and yet be bound to the Crown.

In point of fact the application of the terms of the Covenant to the Dominions is full of perplexities. Are the different parts of the Empire bound to guarantee the territorial integrity and existing political independence of one another? If any part goes to war contrary to its duties under Articles XII, XIII, or XV of the Covenant, can the other parts be required to apply to it measures of commercial and financial pressure, or even military and naval coercion? Can matters between two parts of the Empire be treated as subjects suitable for investigation by the Council or the Assembly? Are compacts between parts of the Empire treaties within the meaning of Article XVIII, so as to be invalid unless duly registered with the League Secretariat? These are questions which cannot be answered with authority, because no ruling by any accepted body as yet has been delivered. On the last point the Governments of the Irish Free State and the United Kingdom are in absolute conflict, and the action of the Free State in registering on 11 July

<sup>1</sup> The right of legislation is formally reasserted for all the Dominions in the *Irish Free State Constitution Act*, 1922.

1924 with the League the treaty of 6 December 1921, as a preliminary to claiming League intervention, if necessary in view of the Irish boundary dispute, was repudiated by the Imperial Government on 27 November 1924,<sup>1</sup> when it was stated that

since the Covenant of the League of Nations has come into force, His Majesty's Government has consistently taken the view that neither it nor any conventions concluded under the auspices of the League are intended to govern the relations *inter se* of various parts of the British Commonwealth. His Majesty's Government consider, therefore, that the terms of Article XVIII of the Covenant are not applicable to the article of the agreement of 6 December 1921.

The claim is hard to substantiate,<sup>2</sup> because the conclusion is *prima facie* not natural, and the fact that the Imperial Government was unable to adduce the formal consent of the rest of the Dominions to their view indicates that these Governments are not agreed as to the soundness of the British contention. Moreover, it is decidedly unfortunate that the conventions concluded under the aegis of the League expressly exclude in some cases the relations *inter se* of territories forming part of the same sovereign State, whether or not these territories are individually members of the League, as in Article 25 of the Convention on the Régime of Navigable Waterways of International Concern and similar treaties.<sup>3</sup> If the British principle were self-evident, it would not, it is arguable, have been necessary to insert such clauses ; but this argument may be met by the consideration of special precaution. Further, it may be contended that the reference in Article X to political independence excludes the Dominions and India as in any way referred to in that article, and *a fortiori* relieves them from any risk of being asked to act against the United Kingdom. The internal arrangements of the British Empire are, it may be held, covered

<sup>1</sup> See also Mr. Chamberlain, House of Commons, 17 Dec. 1924 ; 17 Feb. 1926 (as to the similar case of the Treaty of 1925).

<sup>2</sup> The Free State dissented on 18 Dec. 1924 (L.N.T.S. xxvii). See further, § 9.

<sup>3</sup> *Parl. Pap.*, Cmd. 1993. Convention and Statute on Freedom of Transit, 1921, Art. 15, Cmd. 1992 ; Convention and Statute on the International Régime of Maritime Ports, 1923, Art. 23, Cmd. 2141. But there is no clause to this effect in the International Convention for the Suppression of the Traffic in Women and Children, 1921, Cmd. 1986. In the case of the Arms Traffic Convention of 1925 the non-applicability of its terms to parts of one Empire was asserted in discussion.



by Article XXI, which provides that 'nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings, like the Monroe doctrine, for securing the maintenance of peace'. Clauses like Article 25 of the Navigable Waterways Treaty mentioned above certainly recognize that there may be parts of a single sovereign State which are members of the League, and Article I of the Covenant itself contemplates the membership of the League by any self-governing Dominion or Colony. But unfortunately it further confuses the issue by making such election to membership conditional on it giving 'effective guarantees of its sincere intention to observe its international obligations', and strictly speaking a mere Dominion or Colony cannot be said to have such obligations. The truth is, of course, that the matter could not be thought out in advance, and the Covenant presents a problem which time and usage alone can solve. What is clear is that the British Empire delegation, which has a seat on the Council, is expected not merely to represent the view of the United Kingdom but also of the Dominions, so far as it is possible to ascertain them, but just stress has recently been laid by the Foreign Secretary, in connexion with the question of admission of other powers than Germany to permanent seats on the Council, on the fact that the extent to which the British delegate can express their views must depend on the success attained in consultation in achieving agreement.

In the Assembly the distinct status of the Dominions is marked by their having a vote—a departure from the position at the Peace Conference—and by the fact that their delegates are not accredited by the Imperial Government but by their own Governments, to whom alone they are responsible, while in diplomatic matters proper the only regular procedure is that through the Imperial Government or in such manner as the Imperial Government clothes with its authority. Moreover, rather unexpectedly,<sup>1</sup> no effort has even been made to co-ordinate the action of the various delegations by previous dis-

<sup>1</sup> I adhere to the view I expressed in 1920 that the delegates ought to meet and discuss matters before the Assembly meets. This would imply no derogation from independence, but would merely recognize the fact that there is an Empire. Sir R. Borden appears on 17 Aug. 1925 to have been very tardily converted to this belief.

cussions, and divergences of view have been far from rare. Thus at the very outset of the Assembly meetings Canada manifested her independence by pressing for the recognition of Armenia as a member of the League, and very effectively focussed Dominion opinion against the suggestion that it was the function of the League to deal with such things as the due distribution of raw materials among members of the organization. The British delegate to the Council had committed himself to willingness that the matter should be investigated, but Canada made it perfectly clear that in all matters affecting her resources the only voice to decide must be her own. In the following Assembly it was South Africa which promoted most energetically the movement to secure admittance to the League for Albania, despite her uncertain frontiers and dubious internal stability, and this view ultimately prevailed over the British dubiety as to the wisdom of action. Australia again declined to agree formally to the Austrian admission to the League, on the score that, if Germany were later admitted, Austria would certainly support her claim for a colonial mandate, and Australia was unwilling even to contemplate Germany restored to such a possession. In 1922 it fell to the turn of New Zealand to assert in no uncertain terms her complete responsibility for the working of the mandate for Samoa. But the most important point was Canada's attitude to Article X, which she endeavoured from the first to have erased. As it was clear that its omission would never be approved by the Assembly, at the Assembly of 1923 she obtained an all but unanimous resolution in favour of an interpretation of the article, under which it was to be recognized by the Council, if it recommended military action under Article X, that it should take account of

the geographical situation and special conditions of each State. It is the business and constitutional power of each member to judge as to its obligation to maintain the independence and integrity of the territory of members, and in what measure the said member is obliged to assure an execution of this obligation by the employment of its military forces. Nevertheless, a recommendation given by the Council will be considered as of the highest importance, and will be taken into consideration by all members of the League, with a desire to execute their engagements in good faith.

It must be added that, in addition to the negative voice of

Persia, there were thirteen States which abstained, mainly out of deference to the efforts of the British and French delegations, who maintained that the change was really not substantial. The Canadian delegates<sup>1</sup> considered that, on the whole, they had achieved all that was essential for the protection of Canadian interests. A curious incident in 1922 shows the reaction of League issues on questions between the various parts of the Empire; the Indian delegation during the discussion of the issue of minorities elicited from the South African delegates an admission that the Indians of the Union were entitled to sympathetic treatment, though they were not protected by minority clauses in treaties. The discussions on mandates have further emphasized the independence in their spheres of the Dominion Governments, no effort whatever having been made by the Imperial Government to assume any responsibility for the Dominions.

Closely connected with the League is the Permanent Court of International Justice<sup>2</sup> on which the independent position of the Dominions and India is fully admitted, as contrasted with the constitution of the Arbitration Tribunal of The Hague. Each Dominion and India is empowered to constitute a body competent to nominate four persons, not more than two being nationals of the Dominion concerned or India for consideration for election to the Court by the Council and the League. Canada defined her nationals for this purpose in 1921,<sup>3</sup> in order to prevent it being held that all British subjects were nationals in the sense of the statute, and Sir R. Borden was a serious candidate at the first elections to the Court. The statute of the Court raises serious difficulties. If a Dominion were asked to agree to go before the Court, would the rule that, if one party

<sup>1</sup> *Canadian Annual Review*, 1923, pp. 35 f. A legitimate object for Dominion interest in 1926 was afforded by the request of Abyssinia for the views of the League on the Anglo-Italian agreement, which has naturally been interpreted as giving Italy *carte blanche* to revenge herself for Adowa by undermining Abyssinian independence. This is clearly a very dubious piece of self-interested British diplomacy.

<sup>2</sup> Fachiri, *Permanent Court of International Justice* (1925). No Dominion has accepted the compulsory clause (36) of the Statute of the Court, on which see *B. Y. B. I. L.*, 1925, pp. 68 ff. (the statement as to Newfoundland on pp. 99 f. is erroneous). See also Hudson, *Permanent Court of International Justice* (1925).

<sup>3</sup> 11 & 12 Geo. V, c. 4, s. 1.

has a judge on the Court, the other party is entitled to a like privilege, become operative because there was a British judge ? The mere fact that Canada or a Dominion might be asked to go before the Court shows that in a sense they have international obligations, as is assumed in Article I of the Covenant. On the other hand, could one Dominion demand that another should accept arbitration by the Permanent Court on some matter of difference ? Or would such a dispute be ruled as not of an international character, as is held by the British Government ? It is at least clear that it would be very far from satisfactory that parts of the Empire should try to fight out quarrels before a Court which is not interested in the Empire as such.

The Dominions and India have also found congenial opportunity of influence on the Labour Organization under the League Covenant as developed in Part XII of the treaty of peace with Germany. The organization, though its expenses are found by the League, is not a mere agency, but has a distinctive character and form. In addition to a government body fixed originally at 24 members, 12 governmental, 8 representing the chief industrial States and 4 elected by the other States, and 12 representing employers and employees, there is the Conference at which each member is represented by 2 governmental representatives and 2 chosen in consultation with employers and employees. The results of the deliberations of the Convention take the form either of draft Conventions or Recommendations,<sup>1</sup> a two-thirds majority being required in each case, and, when such a convention or recommendation is agreed on, the members are under obligation to bring the proposal before their legislative authorities. If approved by these authorities, conventions must be ratified and then registered by the League Secretariat, when they become binding, and, if violated, may be the ground of reference to a Commission of Inquiry or to the Permanent Court of International Justice, with the result of the members being authorized to impose commercial penalties on a defiant power. Canada has taken an especially interested part in the proceedings of the organization.<sup>2</sup> In 1919

<sup>1</sup> See *Parl. Pap.*, Cmd. 1174, 1612, 1836, 1866, 2051, 2190, 2292, 2325, 2536.

<sup>2</sup> Yet Canada has practically no legislative power on the issues and has only been able to deal with merchant shipping ; cf. Part IV, chap. i, § 8. See c. 12 of 1924 corresponding to the Imperial Act, 15 & 16 Geo. V, c. 42.

Germany and Austria were admitted as members, while in 1922, after India had been declared by the Council of the League to be entitled in lieu of Switzerland to membership of the Governing Body as one of the eight chief industrial States, the Conference agreed to an increase of the Governing Body to 32, 16 government, and 16 representatives of employers and labour elected by the corresponding delegates to the Conference.

On the other hand the attitude of the Dominions has inevitably been in the main negative towards the great project of 1924 for securing the completion of the purpose of the Covenant by tightening up its penalty clauses, and thus securing that it shall operate towards the promotion of that disarmament which is essentially conditional on the disappearance of insecurity among the States of Europe. This took shape as the protocol of 2 October 1924 for the Pacific Settlement of International Disputes,<sup>1</sup> which replaced the draft treaty for mutual assistance<sup>2</sup> which represented the chief work as regards reduction of armaments of the fourth Assembly. The Dominion representatives at Geneva were, indeed—rather foolishly—induced not to part from the British representatives to the extent of declining to agree to the protocol, but from the first, as the Canadian representative observed, it was unlikely that Canada or any other Dominion would proceed to ratify. One fatal difficulty *inter alia* presented itself, in addition to the rooted disinclination of the Dominions to commit themselves in any regard to further guarantees of European conditions. Article XV of the Covenant provides that, if any matter in dispute between two members is held by the Council to relate merely to a question of domestic jurisdiction, then no further action by the League in respect thereof is competent. Article 5 of the protocol, on the other hand, applied to the arbitrations rendered obligatory under its terms the principle that, if either party claimed that the matter at issue fell under its domestic jurisdiction, the opinion of the Permanent Court of International Justice should be taken, and the decision of the Court should be binding. But it added that such a decision should not prevent consideration of the issue by the Council or the Assembly under Article XI of the Covenant. The reference, of course, was to the question of immigration *par excellence*, Japan having from the first claimed, though

<sup>1</sup> *Parl. Pap.*, Cmd. 2273, 2289.

<sup>2</sup> *Ibid.*, Cmd. 2015, 2200.

in vain against the opposition of the British Empire, that immigration should be a matter to be dealt with by the League. Moreover, Article 10 of the protocol gave a valuable privilege to the power which, defeated by a decision that the matter was one of domestic concern, nevertheless submitted the matter to the Council or the Assembly. It could not then be held automatically to be an aggressor, if it violated such a decision by taking up arms. Thus, it was felt in the Dominions,<sup>1</sup> in the very kind of war which most affected them, they might find themselves unable to claim that the enemy was an aggressor under the terms of the League Covenant. A further difficulty was felt in some quarters : would the result of the protocol be to force parts of the British Empire to act against other parts ? The uncertainty of the application to the parts of the Empire *inter se* of the terms of the Covenant was aggravated by the attempt to make these terms more effective in the protocol.

A definite effort was made in February 1926 in the Free State Parliament to define more precisely the nature of the relation of the Free State to the Empire and the League of Nations.<sup>2</sup> The cause of offending was the rash action of a member of the British delegation to the League Assembly of 1925 in speaking on the subject of compulsory arbitration, when he said :

The British Empire at the present moment was a very peculiar and composite political unit. It did not consist of one Government alone ; it consisted of a partnership of six nations standing on a footing of equality. In a matter which affected the vital interests not only of Great Britain but of any one of these six partners, there had to be solidarity of action. In a matter which affected either the vital interests, the independence, or honour of any one of the six nations there must of necessity be unity of action.

This was clearly a most improper pronouncement, affecting as it did to negative the independence in League matters of the several members of the League included within the Empire,

<sup>1</sup> See New Zealand Government Memo., 6 Jan. 1925 (*Parl. Pap.*, Cmd. 2458, p. 15) ; Australian Government, 5 March 1925 (*ibid.*, p. 21). A different but not plausible view is taken by Baker, *The Geneva Protocol* (1925) ; for conjectures on the meaning of 'domestic jurisdiction' in Art. 15 of the League Covenant, see *B. Y. B. I. L.*, 1925, pp. 8-19. For Mr. Latham's view of the protocol and of Art. 15 of the Covenant, see his speech in the Australian House of Representatives, 11 Sept. 1925, when he shows the insecurity of the existing protection.

<sup>2</sup> Mr. Johnson, *Dáil Éireann*, 5 Feb. 1926.

and the Irish representative, the Minister of Justice, promptly rose to deny the accuracy of this insulting pronouncement, which was hastily disavowed by the British delegation. The effort, therefore, to dominate in the League the decisions of the Governments of the Dominions may be regarded as effectively disposed of. But there remain other points of importance on which the Irish Free State ministry is in doubt. The Minister for External Affairs contended that in the League of Nations the British Empire stood merely for the United Kingdom and its dependencies, excluding the Dominions, and India clearly on this theory would have to be excluded, since the only ground for such exclusion is the possession of a distinct status within the League. This point alone ruins the argument; the case of India proves that control by the United Kingdom does not exclude membership of the League. Moreover, if the matter were pressed, it would follow that in the League Council the British Empire representative would have no obligation to consider Dominion views. As matters stand, the British Empire representative speaks with a view to the interests of the whole of the Empire in the Council, and the Dominions are fully entitled to expect that his attitude shall be determined as far as practicable with the assent of the Dominions. There is a perfectly convincing instance of this in the British declaration as to the Geneva Protocol in 1925. The effort to differentiate between the British Commonwealth and the British Empire is idle folly. The former expression, which is thoroughly objectionable, had never been used officially or in legislation outside the Irish treaty, until it made a sporadic reappearance at the Imperial Conference of 1926, whereas, since the Peace Conference, the term British Empire has been in regular employment to denote the whole complex of British territories and protectorates. But the Minister for External Affairs showed his good sense when he recognized that the Dominions, including the Free State, could not claim neutrality in a British war,<sup>1</sup> admitting the power of the Crown on the advice of the British Government to involve the whole of the Commonwealth in war. Echoing the aspirations of another Irishman, Mr. Gavan Duffy, in 1870

<sup>1</sup> Compare Art. 7 of the Anglo-Irish Treaty of 5 Dec. 1921. Art. 49 of the Constitution merely affirms the ordinary rule that active participation in any offensive war needs the sanction of Parliament.

in Victoria, the leader of the Opposition enunciated the desire to obtain recognition from the League or foreign powers generally of the right of the Dominions to remain neutral, suggesting that South Africa would support this view, and even thinking that the Commonwealth might do the same, which is patently absurd.<sup>1</sup>

### § 8. *Dominion Foreign Relations apart from League Affairs*

Outside the actual sphere of League operations the Dominions remain essentially in their former status regarding foreign affairs. In no territory is this more emphatically asserted than in New Zealand, where any attempt to have direct diplomatic relations has been emphatically repudiated by successive Prime Ministers and by the Attorney-General and the Solicitor-General.<sup>2</sup> In Canada, on the other hand, following the footsteps of Sir W. Laurier, Sir R. Borden<sup>3</sup> has spoken of the consular officers of the great powers in Canada as fulfilling diplomatic or semi-diplomatic functions. A further development of this idea was at once seen on the close of the war. There had long been current in Canada the idea that there should be a special diplomatic representative of the Dominion at Washington. Mr. Blake in 1882, Sir R. Cartwright in 1889, and Mr. Mills in 1892, all stressed the importance of securing such special representation, and Mr. D'Alton McCarthy proposed in the latter year the appointment of a representative of Canada on the staff of the Minister at Washington whose special duty would be to safeguard Canadian interests; but an amendment by the Government<sup>4</sup> suggesting prior discussion with the Imperial Government was carried, and, as has been noted, Sir W. Laurier in December 1909 held that Mr. Bryce's services rendered any such appointment then needless, though he also regarded Consuls as having attained semi-diplomatic status. In 1918, however, by Order in Council under the *War Measures Act* a

<sup>1</sup> See further, Part VIII, chap. iii, §§ 7, 8; Part V, chap. x, § 4.

<sup>2</sup> See especially Sir John Salmond, *New Zealand Official Year-Book*, 1925, pp. 781-3.

<sup>3</sup> Sir W. Laurier, 7 Dec. 1910, *Deb.*, 1910-11, p. 953; Sir R. Borden and Japanese Consul-General as to accession of Canada to the Anglo-Japanese Treaty of 3 Apr. 1911, *Deb.*, 1912-13, pp. 6958 ff, 7550; *Canadian Const. Studies*, pp. 127 f.

<sup>4</sup> It is point of fact in 1887 inaugurated the practice of informal arrangements with United States ministers; cf. Skelton, *Sir Wilfrid Laurier*, i. 373.



Canadian War Mission was established at Washington, which served in part the purpose of a diplomatic mission. But Sir R. Borden went further, and, after much pressure, was able on 10 May 1920 to make the following announcement to the Canadian House of Commons : <sup>1</sup>

As a result of recent discussions an arrangement has been concluded between the British and Canadian Governments to provide more complete representation at Washington of Canadian interests than hitherto existed. Accordingly, it has been agreed that His Majesty, on the advice of his Canadian ministers, shall appoint a minister plenipotentiary who will have charge of Canadian affairs and will at all times be the ordinary channel of communication with the United States Government in matters of purely Canadian concern, acting upon instructions from, and reporting direct to, the Canadian Government. In the absence of the Ambassador, the Canadian minister will take charge of the whole Embassy and of the representation of Imperial as well as Canadian interests. He will be accredited by His Majesty to the President with the necessary powers for the purpose. This new arrangement will not denote any departure either on the part of the British Government or of the Canadian Government from the principle of the diplomatic unity of the British Empire.

The decision was by no means welcomed in the other Dominions, Australia among others remarking that the proposal to entrust during the absence of the Ambassador all Imperial interests to a Canadian was one not acceptable to the Commonwealth, while Mr. Massey was extremely suspicious of this effort to break up diplomatic unity, despite the protestations of either side. In Canada there arose a strong feeling that the position of the Minister would be more onerous than honourable ; eclipsed by the Ambassador, compelled to accept the ruling of ministers across the border, he would become little more than a post box, subject to frequent supersession when Dominion ministers crossed the border and negotiated, as they were fond of doing, direct with United States ministers. In any case it was left to the Irish Free State in 1924 to secure the first appointment of a Dominion Minister to Washington. The British note of 24 June 1924 <sup>2</sup> to the United States Government

<sup>1</sup> *Deb.*, 1920, pp. 2177 f.

<sup>2</sup> *Parl. Pap.*, Cmd. 2202 ; Keith, *J. C. L.* vi. 195 f. ; Mr. Thomas, House of Commons, 26 June 1924.

explained that the Minister would be duly accredited to the President by the King ; that his sphere of action would be confined to affairs relating exclusively to the Free State, on which he would form the ordinary—not the only—channel of communication. Matters which were of Imperial concern or affected other Dominions in the Commonwealth in common with the Irish Free State would continue to be handled by the Embassy.

The arrangements proposed by His Majesty's Government would not denote any departure from the principle of the diplomatic unity of the Empire. The Irish minister would be at all times in the closest touch with His Majesty's Ambassador, and any question which may arise as to whether a matter comes within the category of those to be handled by the Irish minister or not would be settled by consultation between them. In matters falling within his sphere the Irish minister would not be subject to the control of His Majesty's Ambassador, nor would His Majesty's Ambassador be responsible for the Irish minister's action.

Naturally it was not proposed that the Irish Minister should represent the Empire in the absence of the Ambassador, and there seems to have been no suggestion that the Minister would be able to conclude treaties with the United States on any other than the usual conditions, the issue of full powers by the King, while ratification would be subject to His Majesty's approval, in both cases the Imperial Government advising His Majesty, though of course the primary advice is that of the Free State. The actual experience of the Free State Minister does not seem to indicate that any special value attaches to such appointments.<sup>1</sup> Canada, however, is in a different position, and in 1926 announced the appointment of Mr. Vincent Massey as Envoy Extraordinary and Minister Plenipotentiary, and he visited England for discussion with His Majesty's Government to arrange co-operation with His Majesty's Ambassador.

The essential unity of the diplomacy of the Empire was proved shortly after 1919, when the matter seemed dubious in view of the creation of the League, by the procedure followed at

<sup>1</sup> Cf. Borden, 3 *Can. Bar Review*, 518 ff. Lord Curzon doubted the whole proceeding, citing the adverse view of Messrs. Bruce and Massey at the Imperial Conference of 1923, but Lord Haldane defended it in the Lords, 25 June 1924. Cf. Allin, 10 *Minn. Law Rev.* 118 ff.

the Washington Conference. It had been understood by the British Government that, as the result of the consultation at the Imperial Conference of 1921, the Dominions did not desire separate representation at that Conference, but General Smuts emphatically repudiated this understanding, and endeavoured to stir up his fellow Premiers to violent disagreement. Mr. Massey flatly refused to become excited, and the British Government gladly agreed that the same plan should be followed as at Paris, in the sense that there should be distinct signatures for the Dominions. But that there was any recognition of the Dominions as distinct units in international law is, *pace* General Smuts, clearly not the case. As Sir John Salmond, an able jurist and representative of New Zealand at the Conference, attested,<sup>1</sup> there was merely one British delegation, which acted as a single unity, and was recognized by the United States and other Governments as such a unit, owing its legal existence as it did to the full powers granted by the King on the final advice of the Imperial Government, though on the primary advice of the Dominions concerned. Moreover, it was never possible for the delegation to adopt disparate views ; it had to act as a unit, or not act at all, and there can be no doubt that, if it had come to disagreement, the British view must have prevailed. In that case an effort would doubtless have been made to consider whether the treaties arrived at, or any of them, would have admitted of clauses of separate adherence and withdrawal, or clauses providing for non-application of obligations to the Dominions save on express adoption by their Parliaments. Happily the occasion did not arise. General Smuts held also that the recognition of distinct individualities as units of international law was seen in the Genoa Conference of 1922, which discussed issues of economics and the possibility of commercial relations with Russia, but the instance is not in point. Apart from the fact that the Conference was largely based on the economic, financial, and reparations issues of the Treaty of Peace, and the functions of the League of Nations as furthering unity among the peoples, it is clear that the invitation to Canada

<sup>1</sup> *New Zealand Official Year-Book*, 1925, pp. 781-3. See Mr. Massey's speech in the New Zealand House of Representatives, 18 Aug. 1922, as against General Smuts. The Imperial Conference of 1926 adopted Sir J. Salmond's view unequivocally.

came through the Foreign Office, and was not even treated as sufficiently of a League character to be sent direct.<sup>1</sup>

Apparent confirmation was for a time given to General Smuts's views by the news of the conclusion of the treaty between Canada and the United States of 2 March 1923,<sup>2</sup> regarding the halibut fisheries off their coasts. The *Cape Times*, a zealous propagandist of General Smuts's views, hailed the episode as disposing entirely of the contentions of the writer as to Imperial unity, insisting that the Dominion Government had concluded the treaty of its own authority with the United States, forbidding all British subjects to engage in the fisheries in the close season, and despite this fact declining to allow the British Ambassador to share in the signature of the treaty. The old idea of the Empire as body politic was gone, it consisted merely of separate States with one sovereign directly advised by the Ministry in each State. It is perhaps significant of the degree of confidence felt in the validity of the argument that a reply to this attack pointing out that the facts had been entirely misapprehended, and that wholly misleading conclusions had been drawn from them, was not inserted. The facts, of course, were completely other; the treaty was negotiated by the Dominion Government through the Ambassador at Washington with the full approval of the Imperial Government, and the only point which ever arose was whether the treaty concluded should be signed under the usual full powers issued by the King on Imperial advice by the Ambassador and a Canadian representative, or by the latter alone. The Canadian contention, though doubtless it was not well understood in the United Kingdom or Canada, was perfectly simple. The convention clearly by its terms concerned Canada alone, and, if there had been a Canadian Minister at Washington as agreed on in principle in 1920, he alone would have signed it; it therefore followed that it should be signed only by a Dominion representative. On the other hand, the United States Senate desired to add a rider to the treaty making it one applicable to the subjects of the King in general, in which case signature by the British Ambassador would have been normal in addition to

<sup>1</sup> Cf. Keith, *Constitution, Administration, and Laws of the Empire*, pp. 46 ff.; *J. C. L.* v. 161 ff.; *Canadian Annual Review*, 1922, pp. 39-42.

<sup>2</sup> *Parl. Pap.*, Cmd. 2377; Keith, *J. C. L.* vi. 135 f.; vii. 200 f.

signature for Canada. Ratifications were delayed until 21 October 1924 as a result of this rider.<sup>1</sup> But the episode served the useful purpose of inducing the Imperial Conference of 1923 to come to a comprehensive agreement on the subject of treaties.

This Conference<sup>2</sup> was marked by a distinct revival of Dominion interest in international affairs, which had been sluggish since the Dominions had agreed on the proportion of reparation payments. The address to the Conference of the Secretary of State for Foreign Affairs was published, and the Conference agreed to welcome the United States suggestion for an impartial investigation of the reparations issue—a suggestion later brought to fruition in the Dawes' scheme. It also deprecated any idea of dismembering Germany as fatal to the recovery of reparations and inconsistent with the treaty of peace. It approved British policy towards Turkey and Egypt, welcomed the Pacific settlement, and rather hypocritically assured Japan of relations as cordial under the new arrangements which had taken the place of the Anglo-Japanese alliance, and under which the United States, the British Empire, Japan, and France guaranteed their respective possessions and dominions in the Pacific Ocean. The Conference also expressed its support for the attitude of the Council towards the disgraceful attack<sup>3</sup> of Italy on Corfu. The treaty resolutions were noteworthy for the first quite formal<sup>4</sup> recognition of the distinction between treaties proper, negotiated under full powers from the King and ratified by the King, and those concluded usually on administrative or technical matters by representatives of the Governments concerned, not acting under full powers and not ratified by the King, though in some cases subject to confirmation in one form or other by the Governments. The propriety of such agreements was recognized without hesitation, but it was recommended that, before entering on any negotiation, the Government con-

<sup>1</sup> The Act of 1923 to enforce the treaty was too widely expressed, covering foreign ships generally, and it was therefore duly amended (13 & 14 Geo. V, c. 61; 14 & 15 Geo. V, c. 4).

<sup>2</sup> *Parl. Pap.*, Cmd. 1987, 1988.

<sup>3</sup> Cf. *Canadian Annual Review*, 1923, pp. 37–43; P. Lasturel, *L'Affaire gréco-italienne de 1923* (1925); S. P. Nicoglou, *L'Affaire de Corfou* (1925).

<sup>4</sup> In connexion with the Canadian trade agreements of 1910–11 tacit recognition of the legitimacy of the procedure had been accorded by the Colonial Secretary, but neither he nor Sir W. Laurier raised the issue at the 1911 conference.

cerned should take pains to ascertain whether any other Governments were interested in the subject matter of the negotiation, in order that their interests might be secured. As regards other treaties proper, the Conference agreed that negotiations ought not to be undertaken by any Government without due consideration of the possible effect of the negotiations on other parts, or the whole, of the Empire. If the interests of other parts appeared to be affected, then each of the Governments of these parts should be informed of the proposed negotiation, in order that it might express its views and, if the matter were important enough, arrange to be represented. If more Governments than one were represented, they should follow the model of general International Conferences where there was a British Empire delegation, and freely discuss all points arising, while other parts of the Empire, not actually represented at the discussions, should be kept informed of the progress of negotiations.

As regards signature of treaties, it was agreed that, when obligations were imposed on one part only of the Empire, the treaty should be signed by representatives of its Government acting under full powers, indicating the part of the Empire concerned, care being taken in the preamble and text of the treaty to make its application clear.<sup>1</sup> Where obligations were imposed by a bilateral treaty on more than one part, it should be signed by one or more plenipotentiaries on behalf of all the parts concerned. In the case of general treaties negotiated at International Conferences the existing practice of signature for all the parts concerned should be adhered to, the British representatives signing generally, those for the Dominions and India each for his own Government. As regards ratification the existing practice was to continue, under which ratification is expressed in the case of a treaty affecting one part of the Empire only at the request of that part, and in the case of treaties affecting more parts than one ratification is effected only after consultation between the Governments of the parts concerned. It was agreed to leave to each Government concerned the obligation of deciding whether it must have Parlia-

<sup>1</sup> The Canadian treaty regarding the Pacific Halibut Fisheries was accordingly issued *ex post facto* in *Parl. Pap.*, Cmd. 2377, as a treaty between Canada and the United States. Canadian approval of the resolutions of 1923 was formally accorded by Parliament on 21 June 1926.

mentary approval before asking for ratification, thus leaving the Imperial Government free from its former duty in this regard.

The effect of this agreement has been often completely misunderstood by capable investigators, who do not understand that the grant of full powers is a matter in which the King acts and can act only on the advice of the Imperial Government conveyed through the Secretary of State for Foreign Affairs, and that ratification is due to the same source. Mr. Meighen,<sup>1</sup> in the Canadian House of Commons, put the fact with absolute clearness, and Mr. Mackenzie King did not attempt to deny that the position had been correctly stated. The only difference between him and Mr. Meighen was a matter of emphasis; Mr. Meighen correctly stated that, if the matter concerned Canada alone, full powers and ratification would be accorded at once without hesitation, but that the Imperial intervention was essential: Mr. King admitted this, but stressed the side of Canadian advice being the essential. The only point that could be regarded as open to exception in Mr. King's exposition was his citation of the view of the legal adviser to the Foreign Office, to the effect that 'the Imperial Government was not the Government that was formally tendering the advice'. In a loose sense this is true; the real advice comes from Canada, but the responsibility of endorsing it is Imperial, and the legal adviser could never have dreamed of disputing this; if he did, his attitude was absolutely wrong. It need hardly be added, but the fact seems sometimes to have been forgotten, that changes in the constitution of empires are not made by *obiter dicta*, cited at second hand, of civil servants, but by resolutions of Parliaments and responsible Governments.

The outcome of the treaty discussion was precisely in accord with its terms. Canada proceeded to work out a number of treaties under its terms. Thus that of 6 June 1924 regarding the suppression of smuggling operations between the two countries was concluded by the King of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, Emperor of India, in respect of the Dominion of

<sup>1</sup> Cf. *J. P. E.* iv. 802 ff. Note Mr. King's admission that the Imperial Ministers did advise (p. 812), which concludes the whole question. See also Mr. Meighen's view, *Canadian Annual Review*, 1923, pp. 48 f.

Canada, and the arrangement was styled a ' Convention between Canada and the United States of America ', while its application to Canada was clearly made known in its terms.<sup>1</sup> Similar forms were adopted in the Treaty of 24 February 1925 to define the Canadian boundary, in the supplementary Extradition Treaty of 8 January 1925,<sup>2</sup> and in the very important agreement of 24 February 1925<sup>3</sup> regarding the regulation of the level of the Lake of the Woods, which is based on recommendations of the International Joint Commission under the Boundary Waters Treaty of 1909. That Commission under its wide powers has formed an invaluable body for adjusting American and Canadian views,<sup>4</sup> having since its organization in 1912 settled twenty-five contested points referred to it unanimously, and the great issue of the development of the St. Lawrence waterway for ocean shipping and the generation of electric power has been considered by it, though difficulties in executing the scheme exist.<sup>5</sup>

Canada has also concluded a Commercial Treaty of 3 July 1924<sup>6</sup> with the economic union of Belgium and Luxembourg through the Consul-General of Belgium, in all these cases full powers and ratifications being exchanged as usual. In the case of other treaties, as the commercial arrangement with France of 1922<sup>7</sup> and with Italy<sup>8</sup> in 1923, the Imperial Government was also represented, the treaties being negotiated, the one at Paris, and the other in London. In either case the negotiations were performed by the Canadian Ministers alone.

On the other hand the Imperial Government remains in possession of power to bind the whole Empire by its signature of treaties, though under the principles of 1923 it is bound constitutionally—not in international law—to obtain the assent of the Dominions to matters binding them. An excellent

<sup>1</sup> *Parl. Pap.*, Cmd. 2512. The words ' in respect of ' are very significant.

<sup>2</sup> *Ibid.*, Cmd. 2513.

<sup>3</sup> *Ibid.*, Cmd. 2511. See Cmd. 2510 for the boundary treaty.

<sup>4</sup> In 1923 Canada ceased to accord to the United States fishing vessels facilities to obtain supplies, trans-ship catches, and ship crews; *Canadian Annual Review*, 1923, pp. 52 f.

<sup>5</sup> *Canadian Annual Review*, 1923, pp. 55 ff, 1924–5, pp. 83 ff., where the episode of the Chicago Drainage Canal is discussed; 1925–6, pp. 116 f., 227, 335, 376.

<sup>6</sup> *Parl. Pap.*, Cmd. 2315. So with the Netherlands, 11 July 1924, Cmd. 2555.

<sup>7</sup> *Ibid.*, Cmd. 1985.

<sup>8</sup> *Ibid.*, Cmd. 2053.



example of a treaty of this sort is that of 23 January 1924,<sup>1</sup> under which the King waives for certain purposes, in order to assist the United States Government in enforcing its prohibition legislation, the claim to immunity from seizure of British ships when within an hour's steaming from the coast of the ship itself, or any vessels by which liquor is intended to be transported from the ship to the coast. This treaty was agreed to by the Dominions, but is signed merely by the British Ambassador at Washington. Similarly the commercial treaties concluded since 1923 have been signed for the King by a British representative only, though they have contained the usual clauses as to separate adherence and withdrawal of the Dominions, which mean, of course, that unless these clauses were inserted the treaty would apply automatically to the Dominions.<sup>2</sup> Similarly the renewal of arbitration treaties from time to time is accomplished by the British representative alone,<sup>3</sup> though the treaties bind the Dominions, and their consent is as usual obtained before signature. Dominion assent, on the other hand, is not needed for agreements securing privileges only for British subjects, as the notes of 23 April and 4 June 1925<sup>4</sup> which assure to all British subjects, companies, and vessels, most favoured nation treatment in Eastern Greenland, nor to treaties concerning matters in which the United Kingdom and India are chiefly concerned, such as the treaties with Afghanistan of 5 June 1923<sup>5</sup> and with Nepal of 21 December 1923,<sup>6</sup> the title of such treaties being normally Treaty between the United Kingdom and the other Power. Such treaties, it must be noted, may affect the Dominions in some degree. Thus the Anglo-Russian Treaty of 8 August 1924,<sup>7</sup> which was expressed to be between Great Britain and Northern Ireland and the Union of Soviet Socialist Republics, was very far from dealing, as Mr. Bruce asserted, solely with matters affecting Great Britain, nor was the curious form adopted, in which reference to the King was omitted, in any degree intended, as has been ingeniously

<sup>1</sup> *Parl. Pap.*, Cmd. 2199. For British administrative aid, see Cmd. 2647.

<sup>2</sup> *Ibid.*, Cmd. 2345, 2520 (Germany), 2643 (Siam).

<sup>3</sup> *Ibid.*, Cmd. 2077 (Spain, 9 Feb. 1924); Cmd. 2044 (United States, 23 June 1923); Cmd. 2426 (Sweden); Netherlands, Norway, Portugal, all in 1925-7.

<sup>4</sup> *Ibid.*, Cmd. 2503.

<sup>5</sup> *Ibid.*, Cmd. 1977.

<sup>6</sup> *Ibid.*, Cmd. 2453.

<sup>7</sup> *Ibid.*, Cmd. 2215, 2260.

suggested, to show that the Treaty did not apply to the rest of the Empire. In point of fact the Treaty affected the Empire in several ways: it affected every British claim, making no reservation for those of Dominion nations; it provided for the recognition of certain treaties, including the Pacific Seal Fishery Treaty of 1911, which essentially interested Canada; it bound all British subjects to recognize an extension of Russian rights of exclusive fishery; and the whole Empire was meant to be included in the undertaking not to permit hostile propaganda. No effort was made in the Treaty to exclude its operation from the Dominions, and the matter was the more striking in that the contemporaneous commercial treaty<sup>1</sup> contained the usual clauses for separate adherence and withdrawal. Precisely the same thing happened in 1925 as regards the general and the commercial treaties with Siam, though the ordinary form of designation of the contracting parties was adopted.

The position, however, of the Dominions under treaties which they do not sign separately is one of obscurity, which, however, has been considerably cleared up as the result of events in 1924, which again arose from events in 1922.<sup>2</sup> In that year, as the result of the folly of the Greeks, France's ill-will towards the Empire and efforts to obtain advantages for herself—which luckily recoiled on her own head—and the pre-Fascist feebleness of Italy, the Turkish Government succeeded in advancing victoriously on Constantinople. The British Government showed courage and determination, but its attitude to the Dominions was incomprehensible. Without any preparation, on 16 September 1922 it issued an appeal to them to send contingents to support it in resisting an attack on the Straits, the public announcements being made a few hours after secret telegrams, which the ministries were not allowed to disclose to their Parliaments, had been dispatched asking for aid. It speaks volumes for the good sense of the Dominions that they took the shock as well as they did. Mr. Hughes promised the aid of a contingent, and on the 19th and 29th explained as best he could the situation to his Parliament, which, of course,

<sup>1</sup> *Parl. Pap.*, Cmd. 2216, 2261; Keith, *J. O. L.* vii. 106 f.; for false conclusions based on the mention of Great Britain and Northern Ireland in the Treaty, see Keith, vii. 200 f. This ridiculous style was promptly dropped, with the Treaties themselves.

<sup>2</sup> Cf. *J. P. E.* iv. 94 ff., 101.

had the special interest in that Gallipoli, now menaced by the Turks, marked the scene of their great losses and the graves of their heroic dead. New Zealand was equally prompt, and Mr. Massey was less pessimistic in his attitude than was Mr. Hughes, who evidently felt qualms as to the beginning of a new war.<sup>1</sup> In Canada there were ready offers of aid and preparations to send men on the part of the public,<sup>2</sup> but the Government remained cold, and its reply<sup>3</sup> was to the effect that public opinion in Canada would demand the authorization of Parliament as the necessary preliminary to the dispatching of a contingent to participate in the war in the near East. 'We would welcome the fullest information possible in order to decide upon the advisability of summoning Parliament.' General Smuts's view, on 18 October, was that the British Government had merely given the Dominions the opportunity of associating themselves with British action, and that it would have failed in duty if it had not done so. The passing of the danger through the steadfastness of the British Government—perhaps the most creditable and worst rewarded act of Mr. Lloyd George's career—saved the situation, and his fall from power on this score was decidedly ill-deserved.

Lord Curzon then commenced an unparalleled course of blundering.<sup>4</sup> He agreed with France and Italy that at Lausanne in the Turkish negotiations the Empire should be represented by two delegates only, and he decided that one should be himself, the other the British High Commissioner at Constantinople. None the less he assumed throughout that the Dominions would be quite willing to sign the Treaty arrived at without their intervention and consultation. Complaints have been made that Canada failed to make her meaning clear; but the accusation is unjustified. Throughout, the view of the Dominion Government must have been clear to any reasonable person, and it was set out in perfect frankness on 31 December 1922. Canada had not been asked to send representatives, she would not sign, and must leave it to her Parliament to decide in due course what attitude would be adopted. The Imperial Government then arranged for signature by the British representatives

<sup>1</sup> Cf. *J. P. E.* iv. 138 ff.

<sup>2</sup> *Canadian Annual Review*, 1922, pp. 179 ff.

<sup>3</sup> *J. P. E.* iv. 272 f. Cf. in 1899 Sir W. Laurier's position, Skelton, ii. 91 ff.

<sup>4</sup> *Parl. Pap.*, Cmd. 2146.

alone, but naïvely on 22 February and 21 March 1924 asked the Dominion Government to signify concurrence in the ratification of the Treaty and Conventions involved. The Dominion Government replied on 24 March, that, as Canada had not been consulted, had not sent representatives, had not signed, it could not ask Parliament to approve ratification ; ‘ without the approval of Parliament, they feel they are not warranted in signifying concurrence in ratification of the Treaty and Conventions. With respect to ratification, however, they will not take exception to such course as His Majesty’s Government may deem it advisable to recommend ’. They held that the case must be held to fall under the description of a bilateral treaty imposing obligations on one part of the Empire only. The meaning of this perfectly constitutional attitude has been repeatedly misrepresented. As pointed out by the writer,<sup>1</sup> and as later accepted in express terms by Mr. Mackenzie King,<sup>2</sup> the Canadian Government held that, if it were not asked to take part in any treaty, it must be assumed that the obligations of that treaty were predominantly concerned with the Imperial Government, and that accordingly Canada must retain absolute freedom to decide if, in the event of any difficulty arising under the treaty her aid were asked, she would take any active steps. This is in entire contrast to her position in cases where she has been consulted ; in these she signs and takes the full obligation resulting. Her consent to ratification was perfectly consistent ; she has never disputed the fact that the Crown is fully sovereign and can make war and peace ; the Treaty of Lausanne by the British signature and ratification bound Canada, but it did not impose upon her any constitutional obligation to send troops to vindicate its terms, e. g. those as to the freedom of the Straits. It may be added that the other Dominions were satisfied to act on the model of Canada, and not one of them, though it was declared in the British House of Commons that they were anxious for ratification, undertook any obligation to support the Imperial Government in respect of the Treaty.

<sup>1</sup> *The Times*, 26 April 1924 ; *J. C. L.* vi. 194.

<sup>2</sup> *Commons Deb.*, 9 June 1924 (p. 3051). At the Imperial Conference of 1926 Mr. King similarly made no claim of independent status. Constitutional usage and international law are quite different things, and it is only confusing to ignore that fact, as even Lewis, *B. Y. B. I. L.*, 1925, pp. 30–44, inclines to do.

Fortunately a second opportunity was given to Canada to express her intention to receive fair treatment. Mr. Ramsay MacDonald had very unfairly misrepresented her position in the House of Commons,<sup>1</sup> and he proceeded to arrange for the London Reparations Conference on the basis of treating the Dominions as of negligible importance, and bound to homologate the views of the United Kingdom. The firm and dignified protest of Canada<sup>2</sup> evoked copious apologies, after some deplorable misrepresentations from Mr. Thomas<sup>3</sup> and Mr. R. MacDonald; makeshift representation on the panel system, with the right given to Dominion representatives to be present at discussions, even when not on the panel, was accepted by Canada on 10 July as excusable in the circumstances, subject to an express disclaimer by Mr. MacDonald on 23 July, at the opening of the Conference,<sup>4</sup> of the arrangement serving as a precedent. The facts brought home to the Imperial Government the obvious confusion of the arrangements for consulting the Dominions, and a proposal for a meeting of experts to discuss the possibility of better results was mooted, which, however, came to nothing on the fall of the Labour Government, on the sound ground that the time was not yet ripe for further agreement as to procedure.

The same tendency of the Imperial Government to override Dominion rights without consultation was shown in Mr. MacDonald's according recognition to Russia without the slightest intimation to the Dominion Governments of his intention in time to allow of the mildest protest.<sup>5</sup> Doubtless this action, the grave impropriety of which must have been apparent to the Prime Minister, was a deliberate device to avoid the possibility of any demur, it being obvious that the Dominions if confronted with a *fait accompli* would hesitate to object. But the effect of the recognition, though clearly it bound the whole Empire, was apparently not accepted by the Dominion Government,<sup>6</sup>

<sup>1</sup> 6 June 1924 (*J. P. E.* v. 412).

<sup>2</sup> Admirably set out by Mr. Mackenzie King on 17 July 1924.

<sup>3</sup> House of Commons, 18 July 1924. His statements were clearly not in accord with facts. Good faith in these matters is essential. For the proposed Conference, see Cmd. 2301.

<sup>4</sup> *Parl. Pap.*, Cmd., 2258, 2259. See also Cmd. 2184, 2191, 2339, 2558.

<sup>5</sup> Keith, *Constitution, Administration, and Laws of the Empire*, p. xiv.

<sup>6</sup> Keith, *J. C. L.* vii. 106. So too on withdrawal, 3 June 1927.

which, perhaps in retaliation, adopted the procedure of conveying to Mr. A. Yazikoff a formal notification of Canadian recognition on 24 March, though this action can only be set down as a mere nullity. More satisfactory was the fact that on 19 August Mr. Bruce was able to assure the Commonwealth Parliament that he had received assurances that the laches on the part of Mr. MacDonald would not be repeated. It may be noted that the Republican Government in Greece was similarly recognized, without consultation with the Dominions, and the overriding of the rights of Egypt and the resulting destruction for the time being of the constitutional system, and the assistance given to the King to usurp power, were matters fortunately without Dominion sanction. The discussions in the Imperial Parliament revealed how singularly unable were most of the members of the Government and Opposition alike to understand that the Dominions had passed the stage when they could be expected to accept the wisdom of actions of any Government which domestic issues might temporarily place in power in the United Kingdom.

The advent of Mr. Baldwin's administration to power showed an improvement in recognition of Dominion status, little or nothing having been done hitherto to make good Lord Milner's repeated talk (e. g. on 9 July 1919) about absolute equality—which he must have known to be fancy at the time. An effort was made to secure an Imperial Conference to discuss the protocol of 2 October 1924, but the Dominions were unable to concur, and the matter was disposed of by correspondence. Matters then moved towards the Locarno Pact, but the Dominions were not associated in the negotiation. It was indeed impossible to secure their action in that sense; the essence of the scheme being fresh obligations as to European guarantees, the Dominions could not be expected to be willing to commit themselves in any way by sending representatives, even if the difficulties as to arranging for their presence could have been overcome, as would doubtless have been the case<sup>1</sup> if there had been any real chance of securing Dominion acceptance of the pact. The new arrangements achieved, therefore, at

<sup>1</sup> The official plea of difficulties with foreign countries is convenient, but quite unconvincing; difficulties disappear if there is any inducement to overcome them. See also Keith, *J. C. L.* viii. 125 f.

Locarno <sup>1</sup> were made expressly not applicable to the Dominions or India unless accepted by the Governments of any Dominion or India; the formula was borrowed from the abortive treaty of 1919 for the defence of France, and followed the model of the proposal which came to nothing in 1921 owing to the fall of M. Briand from power, save that it gives the power to the Governments, partly, doubtless, because of the inclusion of India in the number of territories specified. It is clear, however, that, save in the case of New Zealand, which was extremely vocal through both Sir F. Bell and Mr. Coates <sup>2</sup> in expressing acceptance of British diplomacy and determination to ask Parliament to approve the results of Locarno, the general opinion in the Dominions was in favour of allowing the obligation to rest with the United Kingdom.

As regards general treaties of a less exciting nature the practice of signature for the Dominions has been adhered to. But a very distinct reduction of Dominion status as compared with the position within the League of Nations is seen in the terms of the Convention for the Regulation of Aerial Navigation of 13 October 1919 <sup>3</sup> as amended on 30 June 1923.<sup>4</sup> The Dominions and India are duly conceded the status of States under the Convention, but in the International Commission constituted under the Convention and placed under the League the United States, Italy, Japan, and France are each given two representatives, the Dominions, India, and Great Britain—an objectionable term—one each, while the whole British Empire has just one vote as a unit, like the other members, though it and the four great powers pay each twice as much of the total cost as the other States. It is inexplicable why the Dominions and India accepted this modification of status, but the obvious explanation may be assumed to be that it was in deference to the views of the United States.

Of the type of informal agreement between Governments, approved, however, by the Imperial Government, is the short

<sup>1</sup> *Parl. Pap.*, Cmd. 2525, 2576. For the non-representation of the Dominions, see Mr. Chamberlain, House of Commons, 18 Nov. 1925; Lord Balfour, House of Lords, 22 Nov. 1925; *Canadian Annual Review*, 1925–6, pp. 141 ff.

<sup>2</sup> 28 Sept. 1925; cf. his Auckland speech, 17 June 1925, *Dominion*, 18 June. Cf. Sir F. Bell, Leg. Council, 9 Feb. 1923.

<sup>3</sup> Keith, *War Government of the Dominions*, pp. 177 f.; *Parl. Pap.*, Cmd. 1916.

<sup>4</sup> *Parl. Pap.*, Cmd. 2329.

agreement between the Government of Mozambique and the Union of South Africa of 1923, which is wrongly treated in its published form as a Convention between the United Kingdom and Portugal.<sup>1</sup>

### § 9. *The Imperial Conference of 1926*

Something was done by the Imperial Conference of 1926 to simplify the issues. The working of the system of treaty-making as fixed in 1923 was reviewed and its worst defects remedied, though the principle was accepted as on the whole adequate. One fundamental defect of the earlier arrangement was the fact that, while it approved separate negotiations by the Dominions, and enjoined on each to consider how far other parts of the Empire might be affected by its action, it left it to the negotiator to decide whether any other part was interested. It is now requisite<sup>2</sup> that information of an intended negotiation should be sent to the other parts of the Empire, members of the Imperial Conference, and each of these parts must with reasonable promptness express its views; if none are expressed, the negotiating part may safely proceed, but it must obtain the positive assent of any part of the Empire if actual obligations are to be imposed on that part, a rule the meaning of which is easily understood by reference to the case of the Halibut Fisheries Treaty of 1923. Where ratification is desirable for the whole of the Empire, it will be legitimate to assume that it can be expressed, unless objection has been made, and, if any part desires that ratification should take place only in respect of a treaty signed by a plenipotentiary for it, it must appoint such a plenipotentiary.

More important still was the decision to improve the form of treaties. Those entered into under the aegis of the League have often been expressed in the inconvenient form of mentioning the British Empire as one unit and then giving separately

<sup>1</sup> Ibid., Cmd. 1888; Keith, *J. C. L.* v. 168. The Angola boundary was settled direct; Cmd. 2777.

<sup>2</sup> Note that under the new rule the Irish Free State and Canadian Ministers at Washington cannot conclude conventions without informing the British Ambassador; they are thus controlled: (i) they are appointed with the sanction of the Imperial Government; (ii) they cannot negotiate behind its back, and their full powers to sign are derived from it; (iii) their negotiations must be ratified with Imperial assent. Their governments are in like case.



the Dominions and India, thus ignoring Great Britain and Northern Ireland and the Crown Colonies and Protectorates save in so far as these are covered by the term British Empire. In lieu, for all treaties the plan was approved of concluding the treaty in the name of the King, and of grouping the British units concerned in the order, Great Britain and Northern Ireland with the Colonies and Protectorates not members of the League ; Canada ; Australia ; New Zealand ; South Africa ; Irish Free State ; and India. In the case of a treaty applying only to one part of the Empire, it should be expressed to be made by the King on behalf of that part. Signature of treaties, where names of countries are given with the signatures, falls naturally to be regulated on the same basis. The issue of full powers to plenipotentiaries for each unit should be made on the advice of the Dominion concerned, indicating the territory for which they are to sign ; but, where some parts are not immediately actively concerned but their citizens may be affected, then they may concur in giving full powers to the British or other Dominion plenipotentiary. Where this is not done, provision may be made for the separate accession of other parts of the Empire. But nothing was agreed to which derogates from the fundamental principle that the full powers, though issued on the advice of the different governments, none the less are issued by the King on the advice of the Imperial Government, which thus retains its control <sup>1</sup> over the initiation of negotiations and the ratification of treaties.

Much more difficult problems were raised as regards the relations of the Dominions to the League of Nations. One point indeed was easily enough disposed of. The question had been raised whether in the case of multilateral treaties expressed not to become operative until a certain number of ratifications had been obtained, the ratifications of the Dominions were to rank as distinct in counting the number. This difficulty can clearly be removed by simply specifying that ratification depends on the ratification by such and such a number of separate members of the League. But the issue of the effect

<sup>1</sup> That this control is dead is asserted by Allin (*Michigan Law Review*, xxiv. 271), but this goes too far. What is truer is that it ought never to be required if there is proper consultation. But the King can only be advised directly by British Ministers ; see Part VIII, chap. iii, § 8.

of League conventions on the relations *inter se* of parts of the Empire had to be faced. It was finally held that the new plan of making treaties in the name of the King would obviate the possibility of arguing that the treaties were binding on the members of the Empire *inter se*, and thus also obviate the necessity of any special clauses in treaties to negative their application in this sense. Stress was laid on the fact that the issue had been discussed at the Arms Traffic Conference of 1925<sup>1</sup> and that the Legal Committee of the Conference laid it down that the principle that parts of the same Empire were not bound *inter se* by such arrangements underlay all such conventions. It was admitted, however, that parts of the Empire might be willing to apply some of the provisions of such conventions *inter se*, in which case this should be specially specified, and the cryptic rule was enunciated: 'Where international agreements are to be applied between different parts of the Empire, the form of a treaty between heads of States should be avoided', meaning doubtless that the agreements should be framed as mere governmental accords. It will be deduced that implicitly the arrangement negatives the claim of the Free State that her treaties with the United Kingdom are matters of international concern, to be registered with the League of Nations, and the insistence of General Hertzog and Mr. Fitzgerald on the status of the Dominions as independent nations of international law. Wisely the formal denunciation of these doctrines was not pressed, and it must be added that, however convenient the result, no argument appears to demonstrate convincingly the incorrectness as opposed to the grave inconvenience of the views of the Free State.

It must be admitted that the new rules offer abundant possibility of difficulty, for in effect they give a wide discretion to the chief negotiating authority, the Imperial Government, to assume agreement from the silence of a Dominion. The reason for this clause is obvious, the failure of the Dominions to express views on the matters communicated freely by the Imperial Government, but the solution is far from ideal. The Dominions ought rather to have been induced to accept the obligation of forming and expressing views on negotiations or ratification forthwith; it is incompatible with their status and their claims that they should

<sup>1</sup> Summarized in *B. Y. B. I. L.*, 1926, pp. 192-4.

allow matters to go by default through apathy, unwillingness to decide even on a simple issue, or, more regrettably still, through the desire to evade responsibility and trusting to be able to lay the blame for any untoward happening on the Imperial Government.

The issue of representation at International Conferences was further elucidated. When these are summoned by the League no difficulty arises, and the Conference optimistically asserted that the arrangements of 1923 ensured adequate consultation between the parts of the Empire, though as a matter of fact that neither is so nor is likely to be so. As regards other Conferences a compromise was arrived at. In the case of those of a technical character it was agreed that each Dominion should be separately represented, if it so desired, and that steps should be taken to secure that the invitation sent rendered this possible. In the case of political Conferences it was admitted that it must lie with each Dominion to decide if its interests were sufficiently concerned to cause it to desire separate representation, or to justify accepting the decisions taken by those parts immediately concerned and separately represented. If, however, any Government desired to be represented, the matter must be adjusted by discussion between the Governments concerned, in the light of the form of invitation received. Three modes of representation were recognized as possible :

(i) By means of a common plenipotentiary or plenipotentiaries, the issue of full powers to whom should be on the advice of all parts of the Empire participating. (ii) By a single British Empire delegation composed of separate representatives of such parts of the Empire as are participating in the Conference. This was the form of representation employed at the Washington Disarmament Conference of 1921. (iii) By separate delegations representing each part of the Empire participating in the Conference. If, as a result of consultation, this third method is desired, an effort must be made to ensure that the form of invitation from the convening Government will make this method of representation possible.

It is added that ' certain non-technical treaties should from their nature be concluded in a form to render them binding on all parts of the Empire, and for this purpose should be ratified with the concurrence of all the Governments. It is for each Government to decide to what extent its concurrence in the ratification will be facilitated by its participation in the con-

clusion of the treaty, as for instance by the appointment of a common plenipotentiary. Any question as to whether the nature of the treaty is such that its ratification should be concurred in by all parts of the Empire is a matter for discussion and agreement between the Governments.' <sup>1</sup> The arrangement, it will be seen, is incoherent and incomplete. The doctrine of General Hertzog, as of General Smuts and of Mr. Doherty in Canada, that a Dominion can never be bound save by the signature of its own plenipotentiary, and that the Dominions are entitled *de plano jure* to separate invitations to, and representation at, International Conferences, is not admitted, and stress is laid evidently deliberately on the propriety of following the model of the proceedings of 1921 at Washington. The point of this is obvious. Unlike the plan of representation by distinct plenipotentiaries, it involves no difficulty with foreign powers. As long as the delegation is one, then its composition is entirely a matter for the governments of the Empire as a question of constitutional relations, not of international law. Separate delegations cannot be arranged without the assent of foreign powers, and it must be noted that, while the Conference secured that the League of Nations should be informed (9 March 1927) of the new manner of regulating the form of treaties agreed on, no suggestion was accepted of a general communication to foreign States regarding Dominion status, such as General Hertzog contemplated when he came to England. His mission, therefore, in its treaty and international status aspect, must be deemed to have completely failed of its purpose.

On the question of the general conduct of foreign policy it was frankly recognized that equality of status did not mean similarity of functions, and that in this sphere, as in that of defence, the major share of responsibility rested and must for some time rest with the Imperial Government, though all the Dominions were in some degree concerned with foreign affairs, especially in connexion with neighbouring powers, as shown by the necessity for the appointment of Mr. V. Massey as Canadian Minister Plenipotentiary at Washington <sup>2</sup> to take charge of

<sup>1</sup> Cf. Mr. Mackenzie King, Canadian House of Commons, 21 Nov. 1924.

<sup>2</sup> It is not now intended that he should act for the Ambassador in the absence of the latter. Mr. Mackenzie King objected to this idea on 30 June 1920 (*Commons Deb.*, p. 4540) and 21 Apr. 1921 (*Deb.*, p. 2410).

Canadian relations with the United States. The Conference recognized that 'neither Great Britain nor the Dominions could be committed to the acceptance of active obligations except with the definite assent of their own Governments'. From this obvious principle nothing further was deduced than that, in regard to the conduct of policy, the principles of co-operation already laid down in respect of treaty negotiation should be applied, a decision in effect restating existing practice or ideals of practice. In one small matter alone was a change made; to gratify Dominion *amour propre* it was agreed that in future even a foreign *consul de carrière* should not be granted an exequatur without the assent of the Dominion Government, and—more interesting—that his exequatur should be sent to the Dominion in order to be countersigned by a minister there. The point undoubtedly is of some value, as it suggests a more direct relation between the Crown and Dominion ministers than is usual, but clearly it must not be exaggerated. Consuls are not diplomatic officials, and the signing of the exequatur by a Dominion minister has no great international significance.

In the same way no effort was made to alter the mode of communication in diplomatic matters between foreign and Dominion Governments, where the Dominions have no diplomatic representation (so far only the Irish Free State and Canada exchange Ministers with Washington). This merely reasserted the firm stand taken by Mr. Massey on the advice of Sir John Salmond against the suggestion that a United States or other Consular representative in New Zealand could raise matters of a diplomatic character, in lieu of the usual procedure through the Imperial Government. But it is satisfactory to find general agreement in the principle that irregular modes of procedure are objectionable.

On the vital issue of closer effective contact between the Governments of the Empire in foreign affairs, especially as regards matters on which urgent decision must be taken, nothing could be effected. The need for closer personal touch was asserted, and the Governor-General was declared no longer to be the representative of the British Government in a Dominion,<sup>1</sup> whence was drawn the conclusion that there would be no one

<sup>1</sup> See Part VIII, chap. iii, § 8.

at a Dominion capital in a position to represent with authority the views of the Imperial Government. Fortunately the Conference shrank from drawing the doctrinaire conclusion that in each Dominion there should be a diplomatic representative of the British Government. Apart from the utter waste of money involved by these appointments, it is perfectly clear that the diplomat would often have nothing serious to do save enjoy himself, and that Dominion ministers would prefer to receive their news direct from the British Government or through their own representatives in London. On the other hand, in the case of Canada it is easy to understand that it might be of real value for the British Government to be able by personal touch through a representative at Ottawa to attain a fuller understanding of Canadian views than through a Governor-General. The common-sense conclusion, which was not attained, was that the Secretary of State for Foreign Affairs should communicate direct with the External Affairs departments of the Dominions, omitting the process of going through the Dominions Office. Mr. Fisher in 1911 was acute enough to see that the relations of the Dominions with the Foreign Office should ultimately become direct, and it is impossible to see how any useful purpose can be served by interposing a third party in the process. The fact that Mr. Amery continued to hold both the offices of Secretary of State for the Dominions and the Colonies caused a painful impression in Dominion circles, suggesting that the change was due to personal considerations<sup>1</sup> rather than grounds of state. There is little doubt that economy and efficiency alike would have been promoted by entrusting the one important function of the Dominion Office, the conduct of communications on foreign affairs, to the Foreign Office, whence it ultimately is derived, and giving the rest of the work to the Prime Minister aided by the President of the Council or other Minister. The allegation that the work which would fall on the Prime Minister on such a scheme would be serious is utterly untenable.

<sup>1</sup> On the retirement of the Permanent Under-Secretary in 1919 Mr. Churchill found himself unable to entrust the duties of the post to any member of the staff, and had to introduce an outsider without colonial experience. The burden of the duties proving too severe for his health, Mr. Amery, still unable to promote one of the staff, solved the impasse by dividing the office, and appointing an outsider with, however, much colonial experience, for the Colonial division, and a member of the staff to the Dominions division.

Clearly, if the Minister of External Affairs of the Irish Free State is authorized to deal direct with the Foreign Office, no injury to Imperial relations could result, and equally clearly it would be absurd to send a diplomat to reside at Dublin, or Wellington, or even Canberra, and Canada with a Minister at Washington and the British Ambassador in readiness can make no great use of a diplomatist at Ottawa, whose chief function will be to beguile the exile of a Governor-General removed from all useful interests and to keep him supplied with the information withheld by Ministers. Fortunately the matter of the arrangements to be made was left over for individual discussion with the Dominion Governments, which, removed from the contagion of an Imperial Conference, are not all likely to be permitted by their Parliaments to involve themselves in any idle apparatus. Moreover, it was expressly agreed that nothing in any case should be done to interfere with the right of direct communication between Government and Government or between Prime Minister and Prime Minister as agreed on in 1918.

On particular issues of foreign policy no result of importance was achieved, though various questions were discussed, including the position of the New Hebrides, British interests in the Antarctic, as well as the wider aspects of Imperial policy, including the status of Egypt, in regard to which Britain appears to be reverting to a more worthy and just policy than that of assisting a ruler to govern by military force, in the teeth of the wishes of the electorate. The question of the acceptance of the compulsory arbitration clause (36)<sup>1</sup> of the Statute of the Permanent Court of International Justice was considered, but the Imperial Government's objections to acceptance were naturally shared by Australia and New Zealand, which feared that the issue of immigration might thus be raised, and, despite the general sympathy of Canada with the clause, it was agreed that no part of the Empire should accept it without further consultation. On the other hand, it was agreed that the findings of the Conference at Geneva in September 1926 as to the conditions on which the United States might adhere to the protocol constituting the Court were in entire harmony with the views of the Empire, whose various parts were represented at Geneva.

<sup>1</sup> Cf. *B. Y. B. I. L.*, 1925, pp. 68 ff. ; 1926, pp. 185-9.

The one issue of outstanding interest was inevitably the Locarno Pact, and it soon became evident that the Imperial Government would ask utterly in vain for any aid from the Dominions on this score, even though it has been made possible for the Dominion Governments as opposed to the Parliaments to express acceptance of obligations. Even Australia and New Zealand declined to commit themselves, though high hopes had been placed on vague assertions of Mr. Coates and Mr. Bruce. Finally, the Dominions concurred in expressing the highest sense of the excellence of British policy, but utterly declined to show the reality of this sense by accepting a scintilla of obligation. It was doubtless wise of the Imperial Government to make the best of a bad business, but the fact remains that the United Kingdom is bound by treaty to take part in certain eventualities in a world war of the gravest character, with the certainty that the Dominions are morally and internationally absolutely free to decline to send a single man or ship or to contribute any form of aid. The position of the Dominions is also not easy; they will be at war, if Great Britain is at war,<sup>1</sup> for the idea that under the treaty they are either bound to or can assert neutrality has no sanction in the terms of the treaty or from the general principles of international law.<sup>2</sup> On the other hand, they cannot claim to exercise any decisive influence on the attitude of Great Britain in such a war crisis, for they are not partners in the treaty. Doubtless on the whole the Imperial Government must be admitted to have been justified in its action in securing the pact, having regard to the needs of European peace, but it remains unfortunate that the Dominions could not be induced either to share in making or in ratifying the pact. It is easy to understand the conditions of local feeling, which rendered it impossible for any Canadian Prime Minister after Mr. Meighen's Hamilton speech in 1925 to risk accepting any external obligation, and which negatived the participation of the Irish Free State or the Union of South Africa. Mr. Mackenzie King is unquestionably right in announcing the impossibility, as matters

<sup>1</sup> Cf. Downie Stewart, *New Zealand Deb.*, 1919, pp. 511 f.; Massey, *ibid.*, pp. 518 f.; Egerton, *Brit. Col. Policy in the XXth Century*, pp. 160 ff.

<sup>2</sup> Mr. Bruce asserted this frankly on 3 Aug. 1926, Mr. T. Roos on 23 May 1927; and Mr. Fitzgerald on 3 June and 16 Dec. 1926 in the Dáil could only hope that neutrality might become possible.



at present stand, of any real unity in foreign policy, but the fact remains regrettable, and, if it cannot be remedied,<sup>1</sup> unquestionably supports the views of those who feel that the Empire must ultimately break up, either into quite distinct states united only by membership of the League of Nations, or states enjoying the same sovereign but united otherwise only by treaty ties on a footing of complete international independence *inter se*.

### § 10. *Extradition Treaties*

Curiously enough it was very long before the Dominions began to be consulted regarding extradition matters; as late as 1915<sup>2</sup> the writer had to point out that it was proper to adopt in this case also the custom of consulting the Dominions. The older procedure simply allowed the Imperial Government to make any treaty, which then became effective throughout the Empire in virtue of the Imperial *Extradition Act*, 1870, and Orders in Council under it. It was never obvious why the matter should be treated in this fashion. Obviously the Dominions were perfectly willing to extradite criminals and desired back their own criminals, or at any rate desired the possibility of fetching them back, and the matter was definitely local from the British point of view, seeing that extradition is asked for only in respect of crimes committed on British territory, and, if conceded, only in respect of crimes committed on or in respect of foreign territory by fugitive offenders in British territory. The Latvian Treaty of 16 July 1924<sup>3</sup> contains the principle of adherence for the Dominions and India, and separate determination on not less than six or more than twelve months' notice on either side.

In Canada the operation of the Imperial Act is suspended by Order in Council in view of Dominion legislation, though this has the small inconvenience that a prisoner *en route* to a foreign country via the United Kingdom does not appear to be in legal custody under a mere Dominion warrant, though he could

<sup>1</sup> Education in foreign policy may have some result. But Canada is far from Europe, and American influence very strong.

<sup>2</sup> Keith, *Imperial Unity and the Dominions*, pp. 298 f.

<sup>3</sup> *Parl. Pap.*, Cmd. 2238. Cf. a treaty with Finland, 30 May 1924 (Cmd. 2417), and the Order in Council, 1925 (S. R. O., No. 448). See also the Estonia Treaty, 18 Nov. 1925 (Cmd. 2708).

normally be rearrested, if he claimed release, under a fresh requisition for extradition addressed to the United Kingdom. Canada has also on her statute book an Act passed in 1889 for extradition without treaty, though it is not used, the need for it passing away when in 1890 a new treaty with the United States became operative. The system was recommended for adoption in England in 1878, but has never been accepted. It was the rule in Upper Canada before the Act of 1842.<sup>1</sup> The *Immigration Act* of the Dominion has been used with excellent effect, as in 1913<sup>2</sup> in the case of the escape from an asylum of Harry Thaw to secure the removal from Canada by the direct action of the Minister of that criminal lunatic, preventing the success of efforts to repeat in Canada the interminable legal processes which had taken place in America.

The Governor of a British possession is made by the treaties the proper person to whom application is addressed for extradition, but he is given the right in each case to refer the matter to the Imperial Government, and the right is clearly in force even in the Dominions,<sup>3</sup> though it would as a matter of course be exercised on ministerial advice. It may, however, be possible that in such a case there might arise an issue of Imperial policy.

### § 11. *Treaties as affecting Federations*

Certain questions are raised by the fact that in federations the central Legislature has usually only restricted power, rendering it uncertain what treaties can effectively be carried out through its action, and what need the action of the local Legislatures. In the case of Canada the matter is made fairly clear by s. 132 of the *British North America Act*, 1867, which confers on the Dominion Parliament and Government all necessary power to implement obligations of Canada, or any province, under Imperial treaties.<sup>4</sup> It is clear, therefore, that if adherence is desired

<sup>1</sup> See 3 Will. IV, c. 6. Cf. *Rev. Stat.*, 1906, c. 155, Part II.

<sup>2</sup> *Canadian Annual Review*, 1913, pp. 239-41; *Commons Deb.*, 4 March 1914.

<sup>3</sup> Even when, as in Canada, the Act is suspended. For the special Extradition Treaty with the United States in respect of Canada of 8 Jan. 1925, see *Parl. Pap.* Cmd. 2513; cf. the Smuggling and Narcotics Treaty of 6 June 1924 and the Act to enforce it, 27 July 1925; *Canadian Annual Review*, 1924-5, pp. 88 f.; 1925-6, pp. 79 ff.

<sup>4</sup> This rule applies, of course, to all treaties now made by Canada. See for an important instance the Act 11 & 12 Geo. V, c. 46, to authorize ratification

in respect of any treaty, it must be expressed for the Dominion on the Dominion Government's request, and doubtless for the Dominion as a whole, as the Provinces ought not to be treated differentially in such a matter. Under constitutional practice the Dominion will not, if the matter be essentially provincial, adhere, unless it be the desire of all the provincial Governments, but if it deems adherence proper, it can do so, and in addition to asking the Provinces to legislate, can itself legislate under the power in question. It has indeed been doubted, as by Mr. Borden on 14 May 1909 in the House of Commons debate on the Boundary Waters Treaty, whether the Dominion Parliament would not have to obtain the assent of Ontario to legislation on the matter, and it was made clear by Sir W. Laurier that the Canadian negotiator of the treaty had instructions to keep in touch with Ontario on the topic, though he did not commit himself to any opinion on the legal head. But in 1911 the Dominion boldly legislated, and expressly repealed any provincial laws running counter to the new treaty. In the same year <sup>1</sup> a strong protest was made against a Bill to prohibit the use of white phosphorus in matches, on the score that by seeking to prevent manufacture and sale, as well as importation, the Dominion Parliament was interfering with provincial subjects, though the action of the Legislature appeared clearly legal, both under s. 132, since it was desired to adopt the international convention, and under s. 91 (2), since the matter in question might well be held to fall under the trade and commerce power. But at the same time Canada, in her negotiation with the United States, absolutely refused to commit herself to provide for the free export of pulp from Canada, since Ontario and Quebec forbade this course, and she declined to contemplate, even if she could, overriding provincial rights.<sup>2</sup> The same difficulty has recurred since,<sup>3</sup> and has also been seen in the determination of Quebec and Ontario to prevent the export to the United States of electric power.

of the Protocol of 16 Dec. 1920 to accept the Statute of 13 Dec. for the Permanent Court of International Justice.

<sup>1</sup> *Commons Deb.*, 19 Jan. 1911.

<sup>2</sup> *Parl. Pap.*, Cd. 5572, 5576; *Commons Deb.*, 1910-11, p. 3389. Contrast *ibid.*, pp. 9337 ff., as to the Boundary Waters Treaty legislation.

<sup>3</sup> In 1923-5 the issue was whether the Federation should place an embargo on export against Quebec's wishes. *Canadian Annual Review*, 1923, pp. 78 ff.; 1924-5, pp. 82 f.

Other instances of refusal of the Dominion to act have been seen in the inability of Canada to adhere until 1921 to the Anglo-American Convention of 1899 regarding disposal of real and personal property, or to accept the convention regarding the prohibition of night work of women, and the convention with France regarding automobiles.

The case of such Dominions as Canada and Australia is provided for in the Labour clauses of the Treaty of Peace, which allow the Dominions in such cases to treat a draft convention merely as a recommendation. In point of fact, Canada, despite her activity on the Labour Organization, where she has a governmental seat as one of the chief industrial powers, has not been able to ratify more than a single Convention, that relating to employment of children under fourteen on board ships. In all other cases, including the famous Eight Hours Day Convention of 1920, her only possible action has been to ask the Provinces to consider legislation,<sup>1</sup> and their response has been insufficiently uniform to allow of much action.

In the case of the Commonwealth the position is even less favourable to the central Parliament and Government; for, while Canada has the wide power of s. 132 though reluctant to use it, the Commonwealth has only the most vague power under s. 51 (xxix) to deal with external affairs, treaties included in the drafts of 1891 and 1897 having disappeared in the final form.<sup>2</sup> Mr. Deakin in 1902 argued that the omission had no effect, but it seems most doubtful whether this can be ruled to be correct, and the High Court has not yet so held. The result is rather chaotic; the Commonwealth, it seems clear, can ask for adherence to be notified in respect of any treaty regarding a matter in which she possesses paramount power to legislate. If she does so, she will, under the rule of the Constitution against preference for any State, act in respect of the whole area. On the other hand, if she has no legislative power, she should only propose to adhere in respect of any State which desires that adherence should be notified, and it must depend on the subject matter whether the adherence can be given unless all the States

<sup>1</sup> *In re Legislative Jurisdiction over Hours of Labour Reference*, [1925] S. C. R. 505.

<sup>2</sup> Cf. Quick and Garran, *Const. of Commonwealth*, pp. 622 ff.; Harrison Moore, *Comm. of Australia* (ed. 2), pp. 461 f.

concur ; thus, for example, adherence in respect of the Aerial Navigation Convention would have been inadvisable unless it could have been expressed for all the States. As regards the territories where she has full legislative power, the position is quite other. But it is clear that in any case pre-federation treaties are binding on the Commonwealth in respect of the States which were parties to them, by reason of her representing the Commonwealth for external relations, as ruled by the Imperial Government in the *Vondel* case,<sup>1</sup> where the Anglo-Dutch agreement as to deserting seamen was ruled to apply to the Commonwealth in respect of South Australia. The same rule has been applied to the Anglo-French declaration of 1889 as regards wreck, and the Convention of 30 August 1890 regarding mail ships, to which all the Australian Colonies save Victoria adhered,<sup>2</sup> as well as Queensland's acceptance of the Anglo-Japanese Treaty of 1894, denounced at the request of the Commonwealth in 1908.

As the Union of South Africa is in essence a unitary state, no difficulty as to treaty obligations past or future can arise.

### § 12. *The Ratification of Treaties with Parliamentary Sanction*

The older doctrine made the Executive Government the authority for the making and the ratification of treaties, and, as regards the making, the tendency at the present day is to insist that the Legislature cannot properly intervene, since its instructions, if given, might unduly fetter the hands of negotiators. An interesting example of the controversy on this topic was that which resulted on 4 March 1926<sup>3</sup> in Sir A. Chamberlain obtaining authority to go to the meeting of the League Council to consider the German application for admission to the League without being tied down by Parliament to agreeing to no addition to the Council save Germany. Similarly the President of the Free State succeeded in securing a vote of the Dáil in favour of leaving the Executive free to negotiate treaties, on the understanding that the Dáil would be given the opportunity to pronounce decisively as to the ultimate fate of the measure. The most, however, that the Imperial Government, save in the

<sup>1</sup> *Parl. Pap.*, Cd. 1587.

<sup>2</sup> *Ibid.*, Cd. 3891, p. 6 ; Cd. 4355, p. 12.

<sup>3</sup> Cf. his speech in the Commons, 23 March 1926.

brief period of 1924 when Labour was in office,<sup>1</sup> has agreed to do is to present for Parliamentary sanction in any appropriate form any treaty of importance, reserving the right to make and ratify minor treaties which involve no change in the law of the land without such approval. The British practice, therefore, recognizes that the approval of Parliament must be sought for any important convention and also for any convention altering the law of the land, before ratification is expressed ; still more, of course, when these two conditions combine. It is further necessary, when it is provided in the treaties themselves that approval by Parliament is required prior to ratification, as was done in the Heligoland Treaty of 1890 and the Anglo-French Convention of 1904, both of which might well have been held not to require legislation. Of Acts required to render certain changes of the law before a convention is ratified, excellent examples exist in the *Copyright Acts* of 1886 and 1911, passed to enable adherence to the Berne and Berlin Copyright Conventions. The Imperial Government also promised to give Parliament an opportunity of discussion of the Declaration of London before it was ratified, but the matter incidentally was defeated by the refusal of the House of Lords to pass the Naval Prize Bill of 1911, without which the Declaration could serve no useful purpose. It was made clear then that there were grave objections to such alterations in prize law as were involved in the Convention being made by Executive authority alone. The War brought home forcibly to successive Governments the propriety of securing Parliamentary assent before ratification of every treaty of importance, and this salutary rule ensured the impossibility of the misguided conventions of 1924 with Russia ever becoming law.

In the case of the Dominions submission to the Legislature is even more binding than in the United Kingdom. Both the Reciprocity and Fishery Treaties of 1854 and 1871 with the United States were made dependent for their operation on legislation, and the Treaty of 1888, which remained abortive, expressly provided in Article XVI for ratification by the Queen after receiving the assent of the Legislatures of Canada and

<sup>1</sup> Treaties were then presented to Parliament before and again after ratification.

Newfoundland.<sup>1</sup> In the case of Canada the tendency to refer formally to the approval of Parliament as a condition precedent to ratification has been aided by the fact of Canadian familiarity with the usage of the United States, where the Senate is an essential part of the treaty-making machinery.<sup>2</sup> In 1906, therefore, in the convention regarding the acceptance by Canada of the Anglo-Japanese Treaty, the approval of Parliament was required, and the same procedure was followed in the French treaty of 1907 and often later, as in the convention with Belgium of 3 July 1924. On 14 May 1909<sup>3</sup> it was laid down by Mr. Borden that in such a case as that of the Boundary Waters Treaty the acceptance of the treaty ought to be made expressly dependent on the approval of the Parliament. He contended in favour of applying express dependence on Parliamentary approval to every case in which a treaty imposed any burden on the people; or altered the law of the land; or required legislative action to make it effective; or hampered the free exercise of legislative power, or effected territorial changes. The argument is sound as regards propriety of submission to Parliament, but there seems no cogent reason for demanding that such mention should be included in the treaty itself, and in point of fact practice is varying in this regard, treaties with the United States seldom containing any such specific provision.

The importance of the war treaties and the Treaty of Washington in 1921-2 resulted in the majority of them being expressly approved by Dominion Act before ratification.<sup>4</sup> In minor cases a less formal procedure has been deemed sufficient, such as obtaining resolutions or passing Orders in Council<sup>5</sup> in favour of ratification. It must be recognized that legislative approval in any form is still merely a matter of constitutional usage, and the necessity of formal consent to minor arrangements is

<sup>1</sup> The Anglo-French treaty of 1857 as to the fisheries was to depend on colonial and Imperial legislation, and never took effect, as the Colony declined to legislate.

<sup>2</sup> Cf. Skelton, *Sir Wilfrid Laurier*, ii. 129, for a defence of the American system.

<sup>3</sup> *Deb.* 1909-10, pp. 6647 ff.

<sup>4</sup> e. g. Union of South Africa Acts, No. 49 of 1919; No. 32 of 1921; Australia, No. 20 of 1919; No. 40 of 1920; No. 20 of 1921; No. 4 of 1922; New Zealand, No. 20 of 1919; No. 28 of 1920; Canada, in addition to Acts for the Peace Treaties, legislated (1921, c. 46) to put in effect the Permanent Court of Justice.

<sup>5</sup> Mr. Bruce, *Commonwealth Deb.*, 15 July 1926.

not rigidly accepted in the Dominions any more than it is in the United Kingdom. On 21 June 1926 it was unanimously held to be necessary by the Canadian House of Commons as regards treaties imposing obligations to take military or economic sanctions, such as the Locarno Treaties.

One result of the submission of treaties to Parliament is inevitable, as in the case of the United States reference to the Senate. It is always possible that Parliament may desire to amend, and that even the device by which a Speaker may seek to refuse to allow the treaty itself to be altered may be defeated by the sort of Lower House which does not allow its officers to dictate its conduct. Mr. MacDonald's frank admission that he would not rule out attempts to amend the Anglo-Russian Treaty of 1924 in the Commons was disapproved by the Attorney-General of New Zealand as an inroad on Executive power. But this is clearly rather unwise, and needlessly old-fashioned. It is clear that it will increase the difficulties of treaty negotiation, if the Legislature insists on intervention; but the Senate of the United States has won a good deal for the United States by its intervention, and in the long run it is ridiculous to insist that a Parliament shall acquiesce in the supposed perfection of the work of the Executive. In a suitable case it can change the treaty and bid the Executive seek the approval of the other party to the new form.

### § 13. *Dominion Ministries of External Affairs*

The effort to keep in touch with the Imperial Government as to foreign affairs has led in the Dominions to the concentration of these communications in the offices of the Prime Ministers, or a Minister of External Affairs, as in the Irish Free State or New Zealand, who have one by one started improved organization to deal with such questions, the stream of correspondence having reached in 1925, according to Mr. Amery, some 600 dispatches and 200 telegrams, whose fate, it may be feared, is chiefly filing.<sup>1</sup> The decision of Mr. Bruce to maintain in

<sup>1</sup> The portfolio of external affairs became Prime Ministerial in Australia in Dec. 1921, following the Canadian model; Mr. Mackenzie King in both his ministries (1921 and 1926) took the post. The Prime Minister in South Africa deals with all these matters. The Minister for External Affairs of the Free State took part in the Imperial Conference of 1926.



London a liaison officer with instructions to keep him personally in touch with confidential issues is no doubt harmless, though critics in the Commonwealth insisted that the High Commissioner must not be put in the position of not receiving information possessed by a junior officer. But, as Mr. Hughes insisted, the real need was for foreign issues to be understood by the people of the Commonwealth, and to become a matter of real concern to them. No amount of familiarity with questions of this kind by the Prime Minister himself will avail to make the Dominions interested in foreign questions, though, as a preliminary to such interest, full information given to successive Governments is doubtless in the highest degree desirable. The suggestion that the Dominions should accredit their High Commissioners as Ministers Resident, and charge them with diplomatic functions, has never taken root in the Dominions. In New Zealand,<sup>1</sup> where the question has often been mooted, the attitude of the Government has always been one of blank negation. The theory is clear; the High Commissioner is an excellent intermediary who can transmit views whenever necessary, and convey Dominion views to the Imperial Government, without making the fatal mistake of introducing personal views. If his status were made diplomatic, it seems to be felt that he would be much more likely to be inclined to express opinions of his own, even perhaps to commit his Government in advance. At any rate, on the retirement of Sir James Allen after an exceptionally useful spell of work in 1926, an appointment on the old lines was duly made, while the permanent High Commissioner appointed for Canada in 1922 was a man of great wealth and commercial experience, but not a politician, though the usual compliment of swearing him of the Privy Council was accorded. It is, of course, clear that diplomatic and commercial functions are not easily reconciled, and it seems that at the present state of development the former are of higher consequence than the latter.<sup>2</sup>

<sup>1</sup> See Sir Francis Bell, Leg. Council, 3 July 1924; 9 Feb. 1923 (*Round Table*, xv. 628 f.); House of Representatives, 1 Sept. 1925.

<sup>2</sup> For the suggestion of British representatives in the Dominions, see Part VIII, chap. iii, § 8; Mr. King, 13 April; Gen. Hertzog, 5 May 1927.

## VI

### TRADE RELATIONS AND CURRENCY

#### § 1. *Trade Relations*

LORD DURHAM<sup>1</sup> and his school of thought assumed that control of tariff and customs arrangements would remain with the Imperial Government, and when they worked for Canadian reform, though by the Declaratory Act of 1778 the principle had been for good laid down that taxation would only be imposed on Canada for trade purposes on the footing that the net proceeds went to Canada herself, they contemplated the maintenance of the system by which Imperial Acts fixed the Canadian tariff, and the navigation laws strictly limited the shipping communications of the Dominion. There was, of course, no doubt as to the colonial power to legislate as to customs duties, and double imposts might cause confusion,<sup>2</sup> but the Imperial Acts were paramount and could not, without express authority, be varied, save by adding new duties. The coming of free trade in the United Kingdom rendered it impossible to maintain unchanged the old tariffs, while on the other hand it might be impossible for the Colonies to dispense with the revenues derived from that source. An Act of 1846<sup>3</sup> accordingly authorized the Colonial Legislatures to repeal or reduce duties imposed by Imperial legislation on foreign goods imported into the Colonies. Control of customs legislation generally was accorded in 1857.<sup>4</sup> The new régime of free trade brought with it the utter unfairness of maintaining the preference for British shipping under the Navigation Acts. The Canadian Legislature addressed the Imperial Government on this subject, and in 1849<sup>5</sup> the protest was recognized to be just, the navigation laws disappeared; and the St. Lawrence was thrown open to foreign vessels. In April 1851 Canada received control over her post office, a matter of great importance

<sup>1</sup> *Report*, ii. 282; Wakefield, *Art of Colonization*, p. 312, who added the post office.

<sup>2</sup> See 5 & 6 Vict. c. 49.

<sup>3</sup> 9 & 10 Vict. c. 94; 8 & 9 Vict. c. 93; Adderley, *Colonial Policy*, p. 28.

<sup>4</sup> 20 & 21 Vict. c. 62; 36 & 37 Vict. c. 36, ss. 149-51. Executive control passed in 1851-5.

<sup>5</sup> 12 & 13 Vict. c. 66.

in a new country of vast distances and scanty communications. The concession was made generally also, and in 1850<sup>1</sup> the Australian Colonies were allowed to enact tariffs subject to the rules that nothing should be passed contrary to treaty; that duties should not be imposed on stores for the Imperial forces; and that no differential duties should be imposed; the requirement of reservation imposed on the older Legislatures of the Colonies by the Act of 1842<sup>2</sup> was removed in 1866.<sup>3</sup> In 1852<sup>4</sup> New Zealand was given authority to legislate, subject only to the first two of the restrictions imposed on the Australian Colonies, and in the South African and federal constitutions no limits were legally imposed. In Malta, of course, Imperial stores are not within the sphere of the local power to tax.

The grant of legal power did not, of course, mean that the Imperial Government intended the Colonies to do more than reduce duties until they came as near free trade as possible. Even before full authority was conceded, a circular dispatch of 24 June 1843<sup>5</sup> expressly forbade the grant of differential duties without Imperial approval, Governors being instructed to reserve such Bills, a rule which was adopted more formally in the instructions to Governors and once more laid down by Lord Ripon in 1895,<sup>6</sup> though the instruction is not now respected, for Tariff Bills with varying schedules are never reserved. Bounties at one time were discouraged, the Lieutenant-Governor of New Brunswick in 1849<sup>7</sup> being instructed not to assent to any Bill to grant a bounty. But the Imperial Government was willing from 1850 to 1867 to acquiesce in arrangements in Canada (e. g. in 1859 and 1866) between the provinces and in Newfoundland (1856, c.1) for preferential trade, and it sanctioned the Canadian arrangements as to trade with the United States in 1854 and 1871, Canada receiving more favourable treatment in the United States than was accorded to British products of the same class.<sup>8</sup> But it was with considerable surprise that in 1859<sup>9</sup> the first protective

<sup>1</sup> 13 & 14 Vict. c. 59, ss. 27, 31.

<sup>2</sup> 5 & 6 Vict. c. 76, s. 31.

<sup>3</sup> 29 & 30 Vict. c. 74.

<sup>4</sup> 15 & 16 Vict. c. 72, s. 61.

<sup>5</sup> Hannay, *New Brunswick*, ii. 122.

<sup>6</sup> *Parl. Pap.*, C. 7824, p. 9.

<sup>7</sup> Grey, *Colonial Policy*, i. 279. Cf. for intercolonial preferences Prince Edward Island 19 Vict. c. 1; Canada 31 Vict. c. 7.

<sup>8</sup> A precedent followed in the abortive arrangement of 1911.

<sup>9</sup> *Parl. Pap.*, H. C. 400, 1864.

tariff of Canada was received. The Sheffield Chamber of Commerce remonstrated, the Secretary of State backed their complaint, though taking care to admit that the Act would not be disallowed. It was, it is clear, perfectly honestly held in England that Canada was imposing a grave burden on her consumers for no just cause, and was ignoring all the benefits of free trade. Mr. A. Galt, not unnaturally, took the occasion to read the Imperial Government a solemn lesson on the impropriety of the mere idea that the Act might be disallowed.

Self-government would be utterly annihilated if the views of the Imperial Government were to be preferred to those of the people of Canada. It is, therefore, the duty of the present Government distinctly to affirm the right of the Canadian Legislature to adjust the taxation of the people in the way they deem best, even if it should unfortunately happen to meet the disapproval of the Imperial Ministry. Her Majesty cannot be advised to disallow such Acts, unless her advisers are prepared to assume the administration of the affairs of the Colony irrespective of the views of its inhabitants.

The Imperial Government replied by pointing out that industries fostered under tariffs were apt never to become self-supporting, a view Mr. Galt did not accept, though experience in Canada was to confirm its accuracy. Yet it was 1879<sup>1</sup> before a protective tariff of a really effective type was passed in the Dominion.

In Australia, Lord Grey<sup>2</sup> would have liked to enact a tariff union in 1850, and on 31 October 1851 he urgently recommended to the Colonies the beauties of free trade, his doctrine being that the Imperial Government was under a duty to impose, if at all practicable, this admirable system on the Colonies. No great heed was paid to his advice, but the Imperial Government on the score of it was believed to have looked with undue favour on the action of the Victorian Upper House in 1868-6 in seeking to prevent the tacking of a Tariff Bill of a protective character on to the Appropriation Bill. In 1867, however, legislation as to the duties on goods in transit on the river Murray between New South Wales and Victoria helped to promote local interest in intercolonial free trade, and in January 1868<sup>3</sup> the Imperial Government professed its readiness to con-

<sup>1</sup> For its causes, see Skelton, *Sir Wilfrid Laurier*, i. 205 ff.

<sup>2</sup> *Parl. Pap.*, 1 July 1852, p. 67; *Hansard*, ser. 3, ccxv. 2000 ff.

<sup>3</sup> *Parl. Pap.*, C. 576, p. 1.

sider the project of a customs union for the whole of Australia with an equitable division of the proceeds. A Conference at Melbourne, in June 1870, however, was unable to achieve any agreement on the basis of the union, for New South Wales was as devoted to free trade as Victoria to high protection, and all that could be agreed on was to hold that the Colonies should be allowed to make tariffs giving differential duties to other colonies. Tasmania and New Zealand legislated in this sense by Bills (Nos. 43 and 99) which were duly reserved as required under the instructions, while South Australia pressed for the same doctrine. The best argument put up in defence of the new proposals was that elaborated by the Attorney-General of New Zealand,<sup>1</sup> who pointed out that such intercolonial preferences had existed in Canada ; that no treaty forbade them ; the Belgian Treaty of 1862—as well as that with the German Zollverein of 1865—merely prohibiting preference to the United Kingdom, and not intercolonial preference. The Secretary of State on 13 July 1871 <sup>2</sup> had to admit the Canadian precedents, though he tried, not very convincingly, to minimize them ; he admitted also in the same way the truth regarding the treaty position ; but he held that it would not be right to give an unfettered power to impose differential tariffs, and he deprecated the whole idea of reciprocity as proposed in its Imperial aspect. It meant in effect giving colonial manufacturers a wider privilege as against British manufacturers, and must tend to injure the bonds of union which Australia had shown herself anxious rather to strengthen. The Imperial Government, however, did not return an absolute refusal, and its objections would not apply to a customs union with a uniform tariff, though why this should have been the case was not clear. The dispatch was considered carefully at a Conference in 1871, and elicited strong views on the part of the Colonies, New Zealand in special pressing not merely for intercolonial preference if desired, but also for the right to give differential terms, e. g. to the United States, and supporting these demands by references as before to the precedents of Canada,<sup>3</sup> both as regards interprovincial arrangement and the reciprocity treaties with the United States. Lord Kimberley

<sup>1</sup> *Parl. Pap.*, C. 576, pp. 39 f.

<sup>2</sup> *Ibid.*, pp. 2 ff.

<sup>3</sup> *Canada Sess. Pap.*, 1869, No. 47 ; Adderley, *Colonial Policy*, p. 58.

replied on 19 April 1872<sup>1</sup> in a long and rather unconvincing dispatch in which he sought to persuade the Colonies of the benefits of free trade and of the estranging power of differential and protective duties, while he eulogized customs unions as making for harmony within and preventing difficulties arising as to differential duties. Incidentally, he pointed out that the attempt to criticize the action of the Imperial Government in concluding the agreement of 1865 with the Zollverein was inconsistent with the right of that Government in respect of treaties, since the Constitution Acts of the Colonies all forbade imposing duties contrary to treaty. He failed, however, fully to appreciate and still more to answer the contention of the Colonies that it was improper by entering into treaties to fetter the action of the Colonies as to giving one another preferential treatment. The result of the dispatch was a Conference of 1872, in which the request for freedom to make differential tariffs for foreign powers was dropped, though New Zealand was anxious to maintain it, and merely the right of making preferential Australian agreements was asked for. This was conceded in an Imperial Act of 1873, which, however, still provided against differential tariffs for foreign countries, or other, not Australasian, parts of the Empire. It was, of course, possible under the new arrangement for the United Kingdom to be treated in one of the colonies concerned more unfavourably than another colony, but little at the time came of the concession, for the Colonies turned out not to be able to arrange any satisfactory use of the new power they had desired. In 1894, at the Ottawa Conference, the issue of preference within the Empire was raised and pronounced for. It was supplemented by the demand for the removal of all hindrances whether legislative or treaty which might prevent the Colonies from arriving at intercolonial preference agreements or agreements with the United Kingdom. The first of these requests was accomplished by the repeal<sup>2</sup> of the proviso to the Act of 1873 which still refused power to make differential tariffs save as regards the Australasian colonies, while as regards the rest of the Empire the Imperial Government intimated that Bills to effect such tariffs would not necessarily be disallowed, but must be reserved, a condition applied also to Australasian

<sup>1</sup> *Parl. Pap.*, C. 576, pp. 6 ff.

<sup>2</sup> 58 & 59 Vict. c. 3.

Bills. Lord Ripon was not then willing to secure the denunciation of the treaties of 1862 and 1865, because the Imperial Government did not think the risk of losing the benefits of the treaties would be compensated for by the possibility of the grant of colonial preference, and it was not until after the Colonial Conference of 1897 that the treaties were actually denounced. Both that Conference, the Conference of 1902, and above all that of 1907 insisted on demanding the more general application of the principle of preference, which by the latter year was beginning to show greater vitality among the Colonies.

Preferential trade was resolved upon by Sir W. Laurier's Government<sup>1</sup> when on attaining power it sought, in accordance with its established belief, the help of the United States in establishing reciprocity, and found that nothing could be hoped for in that regard. The first concession brought with it the realization that under the treaties of 1862 and 1865 Belgium and the German Empire must be accorded the same treatment as the United Kingdom, and that, further, this concession must be applied to all countries possessing most favoured nation treaties. It was clearly absurd to tolerate this position, and, with a concrete proposal for preference in being, the British Government after the Conference of 1897 had no difficulty in departing from its old position of negation in this regard. The preference was extended in 1898, and offers of greater preference were made at the Colonial Conferences of 1902 and 1907 on the basis of reciprocity, the first concession being motivated by two reasons. In the first place, it recognized the fact of British protection at no cost to Canada, and, secondly, it enabled the consumer in Canada to obtain some of the relief which he had hoped to acquire by a measure of reciprocity with the United States. New Zealand was next to follow the example by giving a preference to the United Kingdom, and by arranging terms, which became effective in 1907, with the South African Customs Union, which, formed in 1903, adopted at once the principle of unconditional preference to the United Kingdom, for the recognition of British protection, and of preference on a reciprocal basis with other British possessions.

<sup>1</sup> See Skelton, *Sir Wilfrid Laurier*, ii. 46 ff. ; Willison, ii. 279-312 ; Ewart, *Kingdom of Canada*, pp. 255-73.

The Commonwealth in 1906 arranged preference with the South African Customs Union, but its offer of a preference to British goods imported only in British ships manned with white labour came to grief on treaty obligations, and in 1908 a simple preference took its place. Efforts to carry the preference further by securing agreements with Canada or New Zealand failed at the time to come to anything.<sup>1</sup> The Imperial Conference of 1911 in addition saw the desire of preference on the part of the Dominions met by a negative on the part of the British Government ; that Government, in lieu, pressed for the appointment of a Dominions Royal Commission, which investigated the possibility of promoting Dominion and British trade by methods other than tariffs. Its recommendations, arrived at during war conditions, came practically to nothing, but in June 1916 the Paris Resolutions<sup>2</sup> indicated a new spirit in the British Government towards the conception of preference, and in 1917 the Imperial War Conference<sup>3</sup> committed itself to the ideal of ' making the Empire independent of other countries in respect of food supplies, raw materials, and essential industries '. It recommended, therefore, the grant of specially favourable treatment to the products and manufactures of other parts of the Empire by each part of the Empire, and the stimulation of emigration from the United Kingdom to the Dominions. The resolution was approved in 1918,<sup>4</sup> and in 1919 it was carried into force in the United Kingdom, the form adopted being that of giving preference on a wide range of existing duties. The Imperial Economic Conference of 1923<sup>5</sup> reiterated the advantage of preference, and the British Government consented to accept the principle, proposing *inter alia* some small new duties in order to grant a more effective preference. But the proposal was not at once homologated, as Mr. Baldwin conceived the impression that the United Kingdom should adopt a protective system such as that prevailing in the Dominions, but the defeat of the Ministry at the general

<sup>1</sup> Commonwealth *Deb.*, 1908-9, p. 837 ; *Canadian Annual Review*, 1910, p. 105 ; *Parl. Pap.*, Cd. 3524, pp. 419 ff.

<sup>2</sup> *Parl. Pap.*, Cd. 8271 ; see also Cd. 8482, 9035. Sir W. Laurier and General Botha disapproved (Skelton, ii. 464 f.).

<sup>3</sup> *Parl. Pap.*, Cd. 8566, p. 114.

<sup>4</sup> *Ibid.*, Cd. 9177.

<sup>5</sup> *Ibid.*, Cmd. 2009, 2115. See also Cmd. 2084.



election resulted in the failure of the proposals of 1923 to pass in the House of Commons. The resignation, however, of Mr. MacDonald's Government rendered it possible to renew the proposals in 1925,<sup>1</sup> with the important change that the additional duties originally contemplated were absolutely dropped, and in lieu the grant of a million pounds to aid in the marketing of Dominion produce was announced. In 1926 the preferences were promised for ten years, but with a reservation of right to reduce the duties on which preference was given.<sup>2</sup>

The Commonwealth and the Dominion of New Zealand adopted in 1921 (Acts No. 25 and No. 19) the plan of tariffs of three schedules ; the general, the intermediate, and the British preference, and in both cases arrangements for reciprocity agreements were contemplated ; Australia achieved agreement with New Zealand in 1922, and with Canada in 1925, though both treaties cost great efforts, and the Dominion Government in 1926 was severely attacked, on the score that it had injured Canadian interests for the sake of Australia.<sup>3</sup> With foreign countries nothing has yet been accomplished. This is in strong contrast to Canada, where the system of various schedules has long been operative in imitation of the United States, and where a large number of agreements or treaties have been concluded. Australian tariff revision in 1925 aimed at further protection of local secondary industries at the expense of British and foreign manufacturers, but at a more effective preference over foreign imports.

The question of the position of the United Kingdom was sharply debated in the Union of South Africa in April 1925, on the occasion of the introduction of the new tariff proposals of the Union Government. The Government appeared to be under the impression that it would be justifiable, on the score of the comparatively small preference accorded by the United Kingdom, to contemplate the making of trade agreements, say with the United States or Germany, under which lower rates of duty would be accorded to these foreign countries than would

<sup>1</sup> See Mr. Baldwin, *J. P. E.* vi. 38 ff.

<sup>2</sup> Mr. Churchill's speech on 6 July 1926 is a most ingenious defence of his change of front since the Colonial Conference of 1907.

<sup>3</sup> *Canadian Annual Review*, 1925-6, pp. 151 f. Australia was accused of dumping butter.

be given to the United Kingdom, or of course the rest of the Empire. General Smuts moved an amendment to the effect that the Government should bring up 'amended preference and tariff proposals which will recognize the principle that in any tariff arrangements with foreign countries Great Britain will automatically enjoy a clear preference on any customs duties fixed under such arrangement'. The Minister for Defence, Mr. Creswell, Labour leader, objected to the doctrine that the United Kingdom should profit by the Colonies, which had led to the loss of the first Empire. The basis of trade preferences was a dangerous one as giving rise to complaints when, as in 1924, there was no action in the United Kingdom to carry out the proposals of 1923, and he censured General Smuts's querulousness on that occasion. But the matter was finally disposed of as a serious political issue by the concession by the Government that any reductions accorded to foreign Powers would automatically be extended to the United Kingdom. The pledge given on 4 May by the Minister of Finance was explicit: 'The Government has no intention of entering into, and will not seek, any trade agreement under which Great Britain will be placed in a less favourable position than the country with which the agreement is effected. In other words, we intend to give her most favoured nation treatment in all cases'. The essence of the proposals involved the removal of the old flat rate 3 per cent. British preference, its increase on certain items, but a general withdrawal on others, the calculation being that, as compared with £860,000 to the United Kingdom and £90,000 to the Dominions—Canada, Australia, and New Zealand—in 1924, the amounts would be £300,000 to the United Kingdom and £50,000 to the Dominions. The British preference of 1919 and 1925 has, of course, inevitably done comparatively little for the Union, and though it was really admitted that the Union owed the defence of her trade to the United Kingdom, it was argued that it was to the interests of the United Kingdom to secure free transit of goods meant for her. At the same time arrangements were made with Southern and Northern Rhodesia under which, while certain restrictions are imposed on the importation of Rhodesian beef and cattle, there is still in force the old system of no customs barriers, the share of Rhodesia in customs collected in the Union, in respect of goods which pass

to Rhodesia, being fixed on an amended basis. Fortunately, the debates on the tariff elicited from the Prime Minister <sup>1</sup> an emphatic disclaimer of any desire to see secession brought about, though the effect of this was modified by insistence by Mr. Tielman Roos that the doctrine of secession still remained an essential part of the Nationalist creed.

The policy of the Union Government as manifested in the tariff evidently does not accept the principle, laid down by Lord Ripon in 1895, that no part of the Empire would wish to give any foreign country more favourable terms than it would accord to any other part of the Empire ; but the desire to continue the inter-imperial preferences already arranged with Canada, Australia,<sup>2</sup> and New Zealand was manifested.

In the Commonwealth <sup>3</sup> and in New Zealand <sup>4</sup> the aim of the preference has been with ever-increasing emphasis asserted to be the grant of preference to the United Kingdom in those cases only where it is not yet desired to arrange for local manufacture, so that its effect must progressively be diminished as local manufactures receive encouragement. The suggestion has been made that, as, in the case of Canada, United States firms establish branches in order to avoid the duty, so British manufacturers should establish branches in the Commonwealth or the Dominion, and the same policy is more indirectly aimed at in the South Africa tariff of 1925. The effort to encourage industries is natural and inevitable, but it remains clear that these protected industries cannot compete in the world market, save for special lines in which they succeed in approaching world prices, and that they impose a heavy burden on primary producers, while they render trade with the United Kingdom and

<sup>1</sup> 28 April 1925 (*J. P. E.* vi. 622 f.). He also adopted the principles of consultation as to treaties affecting other parts of the Empire as laid down in 1923, eliciting a Nationalist criticism on 6 May. The policy was carried out in Act No. 36 of 1925, and by the *Customs Tariff (Amendment) Act*, 1926, the United Kingdom was accorded all advantages possessed by the Dominions, but inadvertently not granted to her.

<sup>2</sup> As a result of the reduction, Australia notified abrogation of the agreement of 1906, suggesting fresh negotiations.

<sup>3</sup> See the *Customs Tariff*, 1926. Mr. Mann's exposure of the damage done to British trade by encouraging secondary industries is noteworthy.

<sup>4</sup> The Postmaster-General (13 July 1926) suggested free trade in the Empire as an ideal.

other parts of the Empire more difficult, seeing that exports from the Dominions must be paid for in some way, and, if manufactures are barred, payment is rendered more difficult. In the case of Canada the primary producers' reaction to this fact produced the great Progressive or Farmers' Movement, which for a time after the war seemed likely to achieve power throughout the Dominion, and which aimed at the increase of the British preference or even the free introduction of British goods, as a means of counteracting the high prices of their agricultural equipment exacted by the East. The reductions of the customs tariff of Canada resulting from the pressure of this movement, which brought about a slight increase in the British preference, have, on the other hand, afforded the main support of the Conservatives, who fought the elections of 1925 and 1926 frankly on the issue of a higher tariff, and by a certain irony the maintenance of the comparatively moderate tariff depends on the political alliance of Quebec—in itself far from desirous of a lower tariff—with the western admirers of free trade. It is significant that the final determination of the Progressive party in March 1926 to follow faithfully an alliance with the Liberals was motived by the discovery that the Unionists could make no really valuable concession on the tariff issue. Their defection and Mr. Mackenzie King's defeat in June rested on another issue, and the West showed in September its adherence to lower rates.

The Free State Government in 1926 intimated that it was prepared to consider, subject to the approval of the Dáil, closer economic relations with the United Kingdom, which, of course, forms the best possible customer for Irish exports of natural produce. The establishment of a customs barrier<sup>1</sup> between the two parts of Ireland has not had any effect towards inducing acceptance of union by the north, though there was a certain amount of annoyance on both sides of the line during the early period of the operation of the new régime. Further trouble was caused in 1926 by the decision to lower the duties on spirits in the Free State, thus encouraging smuggling by sea from the south into the north.<sup>2</sup>

<sup>1</sup> The *Tariff Commission Act*, 1926, marks the end of doctrinaire free trade and sets up a Commission to advise as to tariff changes. The Farmers recognize that they will pay the cost. A very weighty and impartial Commission pronounced for free trade.

<sup>2</sup> Canada and the West Indies reached agreement in 1925–6 for a twelve-year treaty, but no great haste in improving the steamship service resulted.

§ 2. *Currency*

Matters affecting currency were long regarded as essentially connected with the royal prerogative,<sup>1</sup> and in 1851 there was disallowed a Canadian Act of 1850 (c. 8) on the ground that it should have been reserved under the instructions, that it purported to confer on the Governor-General the royal prerogative of coinage, and that it fixed the values of certain foreign coins in Canada, thus interfering with Imperial control of currency.<sup>2</sup> Other Bills passed in 1851 and 1853 were not open to exception, as they did not touch on the prerogative, and were not to take effect until the royal assent had been given. In 1871 (c. 4) the federation regulated coinage on the basis of recognizing the prerogative and requiring the issue of a royal proclamation defining the rates at which coins struck in Canada should pass current. A change of policy, however, took place when by 9 & 10 Edw. VII, c. 14, the whole question of Canadian currency was placed on a statutory basis, the Governor in Council being given the necessary authority in all matters affecting Canadian currency proper. Thus the Act regulates the use in the Dominion of British gold; defines the rates of dollars and cents; and prescribes conditions as to acceptance of foreign currency. The special silver, gold, and copper coinage of Canada is normally struck at the Ottawa branch of the Royal Mint, which was established under agreement with the Imperial Government, and as regards Canada under 1 Edw. VII, c. 4, Canada paying the salaries, &c., of the Mint, and receiving the profits.

While local legislation was natural from the first in Canada because of the propriety of having a currency similar to that of the United States, in Australia the need for any special currency did not occur. It was instead provided under the powers vested in the Crown by prerogative and statute, now represented by the *Coinage Act*, 1870, as amended in 1891 and 1893, that there should be branches of the Royal Mint at Sydney (1855),<sup>3</sup> Melbourne (1872), and Perth (1898), where the

<sup>1</sup> *Parl. Pap.*, H. C. 529, 1864, p. 34 (New Brunswick Act, 1843, disallowed); p. 40.

<sup>2</sup> *Leg. Ass. Journals*, 1851, App. Y. Y.; 1852-3, App. P.; *Canada Sess. Pap.*, 1870, No. 40; 31 Vict. c. 45.

<sup>3</sup> The closing of this Mint was decided on in 1926, as a result of the decline

work of producing sovereigns and half-sovereigns is carried out under the principles adopted in the Royal Mint, but subject to the cost being paid by the local Governments, while the profits adhere to them. The proposal of New South Wales in 1923 to close the branch on the score that it did not pay was abandoned. Silver and bronze coins continued to be imported from the United Kingdom, the importers paying for them at the face value, while the British Government bore the cost of carriage and of replacing worn-out coins. It was, however, agreed in 1898 that the mints at Sydney and Melbourne might manufacture silver and bronze for local use, but this project was not carried into effect, and under the Constitution the matter passed into the hands of the Commonwealth. At the Colonial Conference of 1907<sup>1</sup> the Commonwealth Government succeeded in securing assent to a plan by which the British currencies should be withdrawn at the rate of £100,000 a year, and a new distinctive currency should be created for Australia, to be manufactured in the first instance in England. From 1916 on, manufacture has taken place in Australia. The Commonwealth Government has, of course, the sole duty of regulating this currency, which has no value outside Australia, unless given such by local Act or Order in Council under the Imperial Act. The legal authority for this coinage is contained in Act No. 6 of 1909, which occupies the whole field, giving validity to gold coined in England or at any branch. It was of course necessary for the effective operation of the Act that the Orders in Council of 1 August 1896 regulating currency in Australia under the Imperial Act should be revoked, and this was done by Order in Council of 23 January 1911.

The Union of South Africa resembles the Commonwealth in having a branch of the Royal Mint at Pretoria, established under Act No. 45 of 1919, which provided an annuity of £40,000 for working expenses, and Royal Proclamation of 14 December 1922, which took effect on 1 January 1923. Further, the Mint manufactures a specific South African silver and bronze coinage, which is authorized by Act No. 31 of 1922. The profits on

in gold production, the Melbourne Mint sufficing. A Mint for Rhodesia has been discussed, but decided against on the score of cost.

<sup>1</sup> *Parl. Pap.*, Cd. 3523, pp. 190 ff., 546 f.; Cd. 3524, pp. 170 ff.; Cd. 5273, pp. 158 ff.; Cd. 5745, pp. 168 f., 370 f.; Cd. 5746-1, p. 204.

all coinages go to the Union Government, while the control of the Mint is Imperial. The Imperial Government is further under engagement to withdraw its silver from circulation, while the Union Government is replacing all German and former republican coinages.

New Zealand has no special legislation for a currency of its own, but Newfoundland has an Act (58 Vict. c. 4) which regulates the use of gold, silver, and bronze coinage.<sup>1</sup> It also provides for the issue of royal proclamations to define the rates at which foreign coins are to pass in the Colony, and the rates at which coins struck for circulation in the Colony shall pass current. The determination of the Irish Government to have a local currency was notified in 1926, and carried out by the *Coinage Act*, 1926, it being assumed that the British Government, that unfailing milch cow, would cheerfully, and gratis, take back the £1,500,000 of British token coinage in circulation.

It is the rule in the Dominions that the royal pleasure should be taken as regards designs of currency as a matter of courtesy, not of legal right.<sup>2</sup> In this respect a difference has been made from the rules as to stamps. A minister in New Brunswick who had himself portrayed on an issue of stamps was forced to resign, and the issue recalled in 1861,<sup>3</sup> but the old rule which deprecated the issue of stamps except with the royal effigy has long since passed away.

Control of paper currency was once carefully exercised by the Imperial Government. In 1845 Prince Edward Island<sup>4</sup> was refused authority to issue Treasury notes, redeemable in fifteen years, or to suspend payment of Treasury notes. In 1866<sup>5</sup>

<sup>1</sup> Compare Order in Council, 9 Aug. 1870. For branch Mints, see Chalmers, *Colonial Currency*, pp. 445 ff. The *Coinage (Colonial) Offences Act*, 1853, has been in the main superseded by local legislation.

<sup>2</sup> The Free State, of course, rejects the royal effigy, as it has banished it from its stamps in favour, alas, of hideous designs.

<sup>3</sup> Hannay, *New Brunswick*, ii. 194.

<sup>4</sup> *Parl. Pap.*, H. C. 529, 1864, p. 40.

<sup>5</sup> *Ass. Journals*, 1866, p. 952; *Votes*, 1866, pp. 437-47; 1867, pp. 81, 83; Rusden, *Australia*, iii. 598 f.; Bernays, *Queensland Politics*, pp. 35 ff. The Governor was threatened and his recall demanded. The law to authorize the Bill issue had to be passed while there was no regular Ministry; Mr. Herbert announced indeed his proposals for a Ministry, but the Opposition protested against any action by persons not formally appointed and re-elected, and some members left the Chamber in protest. The Bill, however, was passed, so

Sir G. Bowen in Queensland refused to assent to a measure providing for inconvertible paper currency, pointing out that his instructions required him to reserve any such Bill. Ministers resigned in protest, but Mr. Herbert took office and secured the issue of Treasury Bills. In 1895<sup>1</sup> the Newfoundland Government was permitted to stamp the notes of the banks which could not meet them with a guarantee of payment at a valuation to be decided by a joint committee of the two Houses of the Legislature, it being made clear that by assenting to the proposal the Imperial Government took no responsibility of any kind for the redemption of the notes at the amount guaranteed by the Government of the Colony. In 1910 a suspending clause was *ex maiore cautela* inserted in an Act to provide for currency notes, which, however, were really merely orders on merchants for payment of workers' wages, which on presentation to the merchants were immediately dealt with and withdrawn from circulation, thus not forming in any sense an addition to the coinage.

urgent was the need. The incident was vainly cited on 1 July 1926 in the Canadian Commons as an excuse for Mr. Meighen's action (pp. 5492 f.).

<sup>1</sup> *Parl. Pap.*, H. C. 104, 1895, pp. 6-9.



## VII

### MERCHANT SHIPPING

THE Imperial control in merchant shipping derives directly from the fact that British shipping is a matter of the utmost importance to the United Kingdom, and that even as regards foreign shipping the Imperial Government is vitally interested in securing that it is not so penalized in the Dominions as to bring about retaliation on British shipping generally in foreign ports. At first, of course, the system of the Navigation Laws was enacted Imperially, and the Colonies were given no authority, but when in 1849 these were repealed, the way was open for the passing in 1854 of s. 547 of the *Merchant Shipping Act*, which provided that

the legislative authority of a British possession shall have power by any Act or Ordinance confirmed by Her Majesty in Council to repeal wholly or in part any provisions of this Act relating to ships registered in such possession ; but no such Act or Ordinance shall take effect, until such approval has been declared in such possession, or until such time thereafter as may be fixed by such Act or Ordinance for the purpose.

A further step was taken by the *Merchant Shipping (Colonial) Act*, 1869, of which s. 4 provides :

After the commencement of this Act, the Legislature of a British possession by any Act or Ordinance from time to time may regulate the coasting trade of that British possession, subject in every case to the following conditions : (1) The Act or Ordinance shall contain a suspending clause providing that such Act or Ordinance shall not come into operation until Her Majesty's pleasure thereon has been publicly signified in the British possession in which it has been passed ; (2) The Act or Ordinance shall treat all British ships, including the ships of any British possession, in exactly the same manner as ships of the British possession in which it is made ; (3) Where by a treaty made before the passing of this Act, Her Majesty has agreed to grant to any ships of any foreign State any rights and privileges in respect of the coasting trade of any British possession, such rights and privileges shall be enjoyed by such ships for so long as Her Majesty has already agreed or may hereafter agree to grant the same, anything in the Act or Ordinance notwithstanding.

These provisions were re-enacted as ss. 735 and 736 of the *Merchant Shipping Act*, 1894, while by ss. 366 and 367 power was given to the Governors of Colonies to issue proclamations regarding merchant ships which should have the force of Imperial Acts, and by s. 264 similar value was given to legislation by British possessions under the power conferred by s. 264 to apply to any ships registered in, trading with, or being at any port of the possession any provisions of Part II of the Act relating to masters and seamen which would not automatically apply in the case of ships not registered in the possession.

The Imperial Act also provides for recognition being given to local examinations for certificates for masters and mates, and for marking of loadlines. Moreover, the Act of 1854, as amended in 1862,<sup>1</sup> gave power to colonial courts of inquiry to investigate cases of misconduct by masters or mates, and to cancel or suspend certificates, subject to an appeal to the High Court in England or to the Board of Trade. This was extended by an Act of 1882 to meet the ruling of the Supreme Court of Victoria<sup>2</sup> that the Act did not empower the Navigation Board of that colony to inquire into a case of a collision occurring off the South Australian coast, and now stands as s. 478 of the Act of 1894.

In some cases Imperial legislation or local legislation are possible alternatives, or the latter may supplement the former. Thus s. 238 gives the Crown the widest power to provide for the surrender of deserters in case where provision is made by the foreign country for reciprocal treatment, but local Acts are often passed, under which action is normally taken in lieu of under Imperial Orders in Council.

Disputes between the Imperial and local Governments have not been rare, and surrender of the right of intervention cannot in such cases be expected, because it corresponds to the right possessed as against foreign nations to make representations, and, if essential, to adopt measures of reprisal in order to prevent differential treatment of British shipping. Canada in 1878 endeavoured to regulate the space to be occupied by deck cargoes in the case of all ships visiting Canada, repealing as

<sup>1</sup> 25 & 26 Vict. c. 63.

<sup>2</sup> *In re Victoria Steam Navigation Board, ex parte Allan*, 7 V. L. R. 248; 45 & 46 Vict. c. 76 (now 57 & 58 Vict. c. 60, s. 478).

regards all ships the relative section (23) of the Imperial Act of 1876. This Act was, on Imperial representations, amended in 1879<sup>1</sup> to restrict it to vessels within Canadian legislative authority. More serious was the dispute regarding loadlines; Acts of 1891 (c. 40) and 1893 (c. 22) were never allowed to come into operation, and remain on the statute book as dead letters. A South Australian Act (No. 454) of 1891, regarding the measurement of ships, similarly never received approval, and a Western Australian Act, No. 25 of 1896, to regulate the coasting trade was not approved.<sup>2</sup> But not until 1903<sup>3</sup> was the matter raised in a serious form, for New Zealand, then in the full course of its humanitarian legislation, passed an important measure regarding shipping and seamen which was duly reserved by the Governor, and only assented to just before the period of two years ran out, on the understanding that the matter would be examined fully by a conference in London, together with the Navigation Bill of the Commonwealth, which was introduced into Parliament in 1904 and referred to a Royal Commission. Serious issues were presented, for the Commonwealth claimed on various grounds a wide power of action; Mr. Deakin suggested on 15 June 1909 that the Constitution Act of 1900 was a repeal *pro tanto* of the *Merchant Shipping Act*, 1894. Mr. Garran again sought to hold that ss. 735 and 736 regarding power to legislate as to registered and coasting shipping must be redeemed supplementary powers, though he found it difficult to explain them. The case, however, is perfectly clear in principle; the power to legislate as to shipping is derived from the Constitution, in the case of the Commonwealth from ss. 51 (1) and 98, but the *modus operandi* is prescribed by ss. 735 and 736. That has been recognized once for all by the Canadian Parliament after federation, for by cc. 128 and 129 of 1873 it proceeded to legislate on the authority of the Act of 1854, s. 547, and in 7 & 8 Edw. VII, c. 64, it recognizes s. 736 as binding, while all the Navigation Acts of the Commonwealth have been formally reserved and approved under the sections of the Act of 1894.

<sup>1</sup> *Parl. Pap.*, H. L. 196, 1894, p. 3.

<sup>2</sup> *Ibid.*, p. 10; H. C. 184, 1906, p. 5.

<sup>3</sup> *Ibid.*, Cd. 2483. For a full discussion, see Keith, *Journ. Soc. Comp. Leg.*, ix. 202-24; x. 123-5.

But there remains a great field of doubt as to whether provisions of local Acts are or are not repugnant to the Imperial Act ; is silence in that Act a proof that no further regulation is possible ? This seems implausible, unless further regulation is by necessary intendment excluded, so that the Commonwealth may properly regulate the examination of ships in supplement to the Imperial Act. Other cases are clearly instances of repugnancy ; thus the authority given to the Governor of a Colony to authorize a prosecution for sending a British ship to sea in an unseaworthy condition ought not to be given to a minister, even though the Governor will normally act on ministerial advice, and the appropriation of the proceeds of wreck by the Dominions was technically *ultra vires*, as these revenues had been surrendered by the Crown in return for the British civil list. On the other hand, the provisions of the New Zealand Act and of subsequent Commonwealth legislation as to lighthouses might well be valid as supplementary to the provisions as to lighthouses made in Part XI of the Imperial Act of 1894, which secures contributions on a wider basis from foreign ships and not merely from such ships as actually enter colonial ports.

In view of the utter divergence of opinion as to the legal powers of Dominion legislatures it was fortunate that the Navigation Conference of London <sup>1</sup> in 1907, on which the writer was one of the representatives of His Majesty's Government, was able to arrive at satisfactory results. It agreed by resolution 9 that

the vessels to which the conditions imposed by the law of Australia or New Zealand are applicable should be (a) vessels registered in the Colony, while trading therein, and (b) vessels, wherever registered, while trading on the coast of the Colony ; that for the purpose of the resolution a vessel shall be deemed to trade if she takes on board cargo or passengers at any port in the Colony to be carried to and landed or delivered at any port in the Colony.

But a vessel was not to be deemed to be engaged in the coasting trade if she merely took on board and carried between two colonial ports through passengers from overseas or going abroad, or merchandise conveyed or to be conveyed on through bill of lading from or to an oversea port.

The outcome of the Conference was the decision of New

<sup>1</sup> *Parl. Pap.*, Cd. 3567, p. v. See also Cd. 4355.

Zealand<sup>1</sup> to legislate so as to confine to coasting and registered shipping the application of her legislation, so far as it differed from the provisions of the Imperial Act. But s. 41 of Act No. 36 of 1909 to effect this end still attempted to regulate the conditions to be inserted in bills of lading for the conveyance of goods to as well as from New Zealand, thus imitating the action of the United States in the Harter Act of 1893, a disregard of the obvious rule of international courtesy<sup>2</sup> which requires that no country should seem to regulate contracts made for carriage of goods from another without very serious ground. The Act of 1909, therefore, was only agreed to on the undertaking to pass suitable amending legislation. The Commonwealth recast its Bill in 1908 in the light of the agreement achieved, but it was not until 1912 that it finally passed through the Parliament. Before then, however, certain legal decisions had resulted in changes in the proposals both of the Commonwealth and New Zealand, and led to their making further claims for authority at the Imperial Conference of 1911.

In the case of the Commonwealth this was due to realization of the potentialities of s. 5 of the Constitution Act, 1900, which provides for the application of the laws of the Commonwealth to all British ships whose first port of clearance and whose port of destination are in the Commonwealth. In *Merchant Service Guild of Australasia v. Archibald Currie & Co. Proprietary Ltd.*,<sup>3</sup> the High Court definitely laid it down that the section would enable the Commonwealth to make its navigation legislation effective upon any ship whose business was trading from one port in Australia back to that port, even if it proceeded beyond territorial limits, and the Commonwealth accordingly amended its Navigation Bill to include in the definition of Australian trade ship 'any vessel employed in trading between Australia, any territory of Australia, New Zealand, and the Islands of the Pacific'. In the case of New Zealand the case *In re Award of Wellington Cooks' and Stewards' Union*,<sup>4</sup> it was held by the

<sup>1</sup> *Parl. Pap.*, Cd. 5135, pp. 72-83.

<sup>2</sup> See the *Imperial Carriage of Goods by Sea Act*, 1924, the Australian Acts of 1904 and 1924, the Canadian Act of 1910 (c. 61), which all accept the limitation now laid down by convention.

<sup>3</sup> (1908) 5 C. L. R. 737.

<sup>4</sup> (1906) 26 N. Z. L. R. 394; Keith, *Journ. Soc. Comp. Leg.*, ix. 208 ff.

Chief Justice of New Zealand that an award of the Court of Arbitration had binding effect on ships registered in New Zealand, even when in Australian ports, but was not effective on Victorian registered ships. The decision, which was very probably sustainable under s. 735 of the *Merchant Shipping Act*, 1894, was not based on that section, but on the alleged power of the Parliament of New Zealand to regulate its own ships and subjects. More far-reaching was the decision in *Huddart Parker & Co. Proprietary Ltd. v. Nixon*,<sup>1</sup> which raised the question whether under s. 75 of the New Zealand *Shipping and Seamen Act*, 1908—a consolidation of the old legislation—it was possible to insist on extra wages being paid while a vessel was engaged in the coasting trade, and to enforce this provision by authorizing the Port Superintendent to withhold a clearance. The ship in question was registered in Victoria, and her rates of pay were regulated by an award of the Commonwealth Court of Conciliation and Arbitration, so that a direct conflict between the two laws arose. The Court held the power effective in so far as a seaman could insist on obtaining his extra remuneration, and a clearance could be withheld. But it denied that the power to regulate coasting gave authority to repeal any provision of the Imperial Act of 1894—in special that one which does not permit a seaman to claim his full wages in any Court abroad if he is engaged for a voyage to terminate in the United Kingdom, or that it should be held to allow the repeal of the corresponding section in the Victorian Act. This Act was erroneously treated as if it had mere colonial force, despite the fact that under s. 264 of the Imperial Act of 1894 it was expressly given Imperial validity. It does not seem, however, that there was sufficient ground for denying that the power to regulate the coasting trade gave power to repeal. It is true that regulation may be held to refer merely to opening or closing the trade, but so narrow a view is implausible, and certainly has not been accepted by the Commonwealth Government or indeed any Government. The Court, however, overlooked a very serious obstacle to the validity of the New Zealand application of s. 75 of the Act. Under the Commonwealth constitution, as mentioned, the award of the Commonwealth Court would seem to have been given validity everywhere, so

<sup>1</sup> 29 N. Z. L. R. 657 ; Keith, op. cit., xi. 294-9.

that the provision in the New Zealand Act might have been held *ultra vires* as repugnant to an Imperial Act, which cannot clearly be altered by a general power given prior to it, such as s. 736 of the Act of 1894. In any case, however, it was clear that when the Commonwealth legislation which demanded the observance of its conditions in regard to all vessels engaged in the coasting trade became operative, there would be no doubt of its application to New Zealand vessels, so that ships which, registered in New Zealand, traded to Australia and coasted there, would be required to pay Commonwealth rates when higher than New Zealand rates, when engaged in the coasting trade, but could not pay lower rates because they would then be liable to be penalized for disobeying New Zealand laws.

A further effort to confuse the issue was made by New Zealand in 1910,<sup>1</sup> when an Amendment Bill was passed to require the observance of New Zealand conditions as to wages should apply to all seamen on ships trading from New Zealand to the Commonwealth or the Cook Islands, while an addition of 25 per cent. should be made in respect of all tickets and documents in respect of goods if any Asiatics were employed in the crew, unless the provisions as to New Zealand wage rates were complied with. The Bill was aimed against the P. & O. Steamship Company, which was guilty of the wickedness of competing successfully in the trade between the Commonwealth and the Dominion with the Union Company of New Zealand and the Huddart Parker Line of Australia. It was proposed to secure the effectiveness of the legislation by obtaining Australian aid in the case of vessels paid off in Australia, but it was admitted to be difficult to secure the carrying out of the rule if the ships were paid off in another place. The Bill, however, was merely a pretext for claiming wider powers.

The discussion at the Imperial Conference <sup>2</sup> was ineffective. Lord Crewe enunciated firmly the doctrine that the effort to turn lascars out of the shipping trade was unjust and unwise, and that it was one thing to exclude Asiatic immigration, another to interfere with their rightful employment in ships trading to Australasia. The President of the Board of Trade laid stress on the necessity of safeguarding British shipping

<sup>1</sup> *Parl. Deb.*, cli. 839 f.; cliii. 695, 835 f., 871.

<sup>2</sup> *Parl. Pap.*, Cd. 5745, pp. 143 ff., 396 ff.

from vexatious interference, to which foreign shipping could not be subjected without causing retaliation, which would fall on British shipping. Sir W. Laurier revived the impossible doctrine that the Act of 1894 was an overriding of Canadian autonomy, asserting, as did Mr. Brodeur,<sup>1</sup> that it had rendered invalid earlier Canadian legislation, which in point of fact had never been valid at all. The Commonwealth delegation asserted that it was satisfied that it had full powers, which, as Sir J. Ward pointed out, was more than dubious. In the result, only Canada and New Zealand asked for extended authority, and nothing was even promised, still less done, to meet their desire. The Bill of 1910 (No. 85) was never assented to, but an Act, No. 37 of 1911, was passed by New Zealand in accordance with the understanding on which her legislation of 1909 was permitted to become law, disclaiming the right to regulate the terms of bills of lading for carriage of goods to New Zealand. In 1912 the Commonwealth Navigation Bill was passed, and being reserved, was duly assented to. The Government withdrew at the last moment, under firm pressure from the Imperial Government, a clause which endeavoured to provide that, if a certificate had been withdrawn in Australia and restored by the Board of Trade, it must not be used in Australia. On the other hand, it insisted on retaining a clause providing for the adoption all year round of the winter loadline, or in the case of sailing ships the North Atlantic loadline, in respect of the carriage of deadweight cargo other than coal, though the wisdom as well as the legality of the enactment was open to the gravest doubt. But the effective coming into operation of the Act was long delayed by reason of war conditions, and it was very extensively amended in 1920 in order *inter alia* to include the provisions as to safety of life at sea agreed on at the Conference of 1913-14, at which Canada, the Commonwealth, and New Zealand were all represented. By this Act it was made clear that many provisions applied not merely to ships registered in the Commonwealth, but also to other British ships whose first

<sup>1</sup> In point of fact the Canadian law, alleged to have been overridden, was never valid, for it dealt with limitation of liability and presumption of fault on breach of collision rules, both matters on which Canada never had power to legislate contrary to the Imperial Acts (see ed. 1, iii. 1525, n. 2). The latter point is now disposed of by the *Maritime Conventions Act*, 1911.



port of clearance and whose port of destination were in the Commonwealth. After its coming into operation it was decided by the High Court in *Newcastle and Hunter River Steamship Co. Ltd. v. Attorney-General for the Commonwealth*<sup>1</sup> that the Act so far as it purported to refer to intra-State shipping failed, but was not rendered invalid merely by that consideration, special care having been taken to save its validity as regards those provisions which might be held to be *intra vires*.

The extent of the power of Dominion legislatures to deal with coasting trade was considered in *S.S. Durham v. Collector of Customs, Wellington*,<sup>2</sup> when it was definitely held that, if a ship once began to engage in the coasting trade, it should be held to continue in that trade until its departure from its last New Zealand port, the claim that the voyage should be divided into sections according as any actual coasting was being done or not being very naturally rejected. The arguments there apply with equal force to the case of the Commonwealth, while s. 5 of the Constitution Act would undoubtedly make good any defects in the power to regulate coasting in the case of vessels falling under the terms of the clause. Nothing, however, has yet been attempted to eliminate the possibility of conflicts between New Zealand and Commonwealth jurisdiction over ships which have their head-quarters in either place and do coasting trade in the other.

In 1911 there occurred a striking example of the determination of the Imperial Government to afford the widest freedom to the Dominions in matters of merchant shipping. Two conventions on collisions<sup>3</sup> and salvage had been agreed to at Brussels in 1910, but instead of accepting them for the whole Empire, the Dominions were given the right to adhere or not, and the *Maritime Conventions Act*, 1911, accordingly did not apply the conventional rules resulting to the Dominions, leaving

<sup>1</sup> (1921) 29 C. L. R. 357.

<sup>2</sup> 31 N. Z. L. R. 565 ; Keith, *Imperial Unity and the Dominions*, pp. 223 ff.

<sup>3</sup> For local collision rules, see *Merchant Shipping Act*, 1894, s. 421 ; Canadian Act, 31 Vict. c. 58 ; *The Eliza Keith* (1877), 3 Q. L. R. 143 ; *The Hibernian*, L. R. 4 P. C. 511, 516, 517. In *The Storstad*, [1920] A. C. 397, it was not contended before the Privy Council that Canadian liability limitation, which differs from the Imperial rule, applied beyond territorial waters or even in regard to a collision between a British and a Norwegian ship in the St. Lawrence ; 56 S. C. R. 324 On inquiries, see *The Chilston*, [1920] P. 400.

it for them to adopt them or not as they thought best. In the case of the convention achieved in 1914, the *Merchant Shipping (Convention) Act*, 1914—whose operation is still delayed—applied generally to ships registered in the United Kingdom, but it imposed on British ships not so registered the obligation, if entering or proceeding to sea from a port in the United Kingdom, of compliance with the rules as to construction, equipment, and manning of ships, and the provision of wireless telegraphy, that are required in the case of registered ships. There is thus a certain disparity of treatment; the Imperial Act binds British registered ships everywhere, even in Dominion harbours; but Dominion registered vessels are bound in British waters by the Imperial Act. What is much more serious is the fact that, as the Act does not apply to ships not registered in the United Kingdom the provisions of Part I, these vessels are not liable to the rules which require masters to report derelicts; to observe certain rules of navigation in the vicinity of ice; to give aid on hearing wireless calls, &c. If they are to be made subject to these rules, it must be by Dominion legislation, and the Act leaves it wholly undecided whether or not such local legislation can be enforced in British Courts. If it cannot, then by registration in a Dominion a vessel might evade the Act, since it need never proceed to its home port. The same question remains unanswered as regards legislation by the Dominions as to registered ships generally or coasting vessels. Does such legislation bind a ship in a British port,<sup>1</sup> and can a British Court enforce it? As under s. 735 a Dominion legislature can repeal provisions of the Imperial Act of 1894 referring to ships registered therein, it might seem that the new provisions must be treated as if enacted Imperially, but the matter was evaded in the controversy as to loadlines with Canada. The Board of Trade there countered the Dominion contention, by pointing out that the assumption that the new loadline proposed by Dominion legislation for registered ships could be deemed to have in British ports Imperial validity was contradicted by the express provision of the Act for the recognition on certain conditions of colonial marked loadlines as equivalent to British marked loadlines.

<sup>1</sup> Similarly, can consular officers and Naval Courts enforce Dominion legislation? Cf. Cmd. 2768, p. 19.

There are, therefore, clear objections to the existing system, under which there is insufficient recognition of Dominion autonomy in legislation, and, as a result, confused efforts by the Dominions to exceed their powers. The question became again acute in the Commonwealth as a result of the decision in the case of *Union Steamship Co. v. The Commonwealth*,<sup>1</sup> in which it was ruled that the Commonwealth Act, in so far as it did not agree with the Imperial Act as to engagement and discharge of seamen, was *ultra vires* in its application to New Zealand shipping. It is clear that there is need for a candid recognition of the propriety of each Dominion regulating her own registered shipping, and, if she desires, vessels engaged in her coasting trade, while other ships should be regulated only in so far as is necessary to carry out the provisions of the legislation of their own legislatures and general maritime conventions. The process of Dominion legislation under ss. 735 and 736 is much too cumbrous, and might have caused inconvenience in the case of the desire to legislate on the lines of the Imperial *British Ships (Transfer Restriction) Act*, 1915,<sup>2</sup> which for war reasons prohibited transfer of British ships to persons not qualified to own them without the permission of the Board of Trade, but confined the operation of the measure to ships registered otherwise than in a self-governing Dominion.

A more satisfactory state of affairs exists under the system of regulation of wireless telegraphy in general after the *Wireless Telegraphy Act*, 1904,<sup>3</sup> and the Order in Council of 29 February 1908 thereunder. The Order extended the provisions of the Act to ships on the high seas, but exempted ships which were using an installation authorized by a British possession in accordance with the authorization given. It was also arranged that even in territorial waters the use of wireless telegraphy was permitted if in accordance with the licence granted by the Government of the territory in which the ship using the wireless was registered.

<sup>1</sup> 16 June 1925; see Mr. Bruce, *Parl. Deb.*, 1925, p. 365. The Imperial Conference of 1926 agreed to refer the matter to a Sub-Conference; see Part VIII, chap. iii, § 8; above, p. 349.

<sup>2</sup> 5 Geo. V, c. 21.

<sup>3</sup> See now the *Merchant Shipping (Wireless Telegraphy) Act*, 1919, and the *Merchant Shipping (Equivalent Provisions) Act*, 1925.

## VIII

### COPYRIGHT LEGISLATION

COPYRIGHT affords a remarkable instance of Imperial control asserted without shadow of constitutional justification, simply because the publishing interest in the United Kingdom possessed sufficient power to induce the Governments of the day to press their claims. The Imperial Act of 1842<sup>1</sup> regarding copyright gave it in the Dominions as well as the United Kingdom, and accordingly prohibited by s. 17 the importation of reprinted copies on pain of a fine and double the value of each copy imported. The Legislatures of the Canadian Provinces pointed out with much cogency that in view of American reprints the carrying out of the Act was impossible and undesirable. In 1847,<sup>2</sup> therefore, power was taken by Order in Council to suspend the operation of s. 17 whenever local provision was made to secure a due return for the author. Canadian legislation from this date to 1850 made such provision, and on the formation of the Dominion proper provision was continued by c. 56 of 1868, which was followed by an Imperial Order in Council of 7 July 1868. But the arrangement of imposing import duties brought little gain to authors, while Canadian printers complained that American reprints were thus able to oust them from having any share in the work. Their complaints were adopted on 1 July 1868 by the Finance Minister, who asked the Imperial Government to secure permission for reprinting in Canada at a royalty of 12½ per cent. on the published price. The Imperial Government demurred that it was uncertain if this would result more favourably to the author than the import duty; that it would make reprints cheaper than the original; and that it would need the termination of existing copyright conventions with foreign powers. The Dominion Government was not convinced, and in 1872<sup>3</sup> passed a Bill, which the Governor-General reserved, and which required reprinting of British copyright works within Canada in a month,

<sup>1</sup> See on it *Parl. Pap.*, C. 7783, p. 17; *Prov. Leg.*, 1867-95, pp. 1281 ff.; Quick and Garran, *Const. of Commonwealth*, pp. 594 ff.

<sup>2</sup> 10 & 11 Vict. c. 95.

<sup>3</sup> *Parl. Pap.*, H. C. 144, 1875, pp. 5-7.

in default of which licences to publish subject to a  $12\frac{1}{2}$  per cent. royalty could be issued and the import of foreign reprints absolutely forbidden. The Imperial Government did not approve this Bill, but suggested in lieu another measure, which contemplated application to a Court in the Dominion for permission to publish any work not issued in a form suitable for circulation in Canada, foreign reprints to be admissible if the work were not reproduced in convenient form within six months after first publication. Canada declined this, but legislated in 1875 (c. 88) to provide that any person domiciled in a British possession or in a foreign country, having a copyright treaty with the United Kingdom, might obtain copyright in Canada for 28 years with the possibility of an extra 14 years by printing and publishing or reprinting and republishing. In either case the importation of foreign prints in such cases was absolutely prohibited. This copyright was additional to that enjoyed under the Act of 1842, under which, as modified by the Act of 1847 and Orders in Council under it, reprints could be imported on payment of an import duty. The Dominion Act was expressly confirmed by an Imperial Act of 1875,<sup>1</sup> as it was doubted whether it was not repugnant to the Order in Council of 1868, providing for imports of reprints. Copyright in Canada was possessed by British subjects through publication in the United Kingdom, and by foreign subjects under copyright treaties made applicable to Canada by Orders in Council under the Acts of 1844, 1852, and 1875. But no copyright in the United Kingdom was obtained by first publication in Canada.

A very important change came about through the Berne Convention of 1886 and the Imperial Act passed to give it force; the convention was deliberately accepted by Canada and the Australasian Colonies, while power was reserved to terminate the convention separately in respect of the colonies in question. The Imperial Act passed to give effect to the convention accordingly gave copyright in the British dominions to any work published in any part of the British dominions for the full terms allowed by the Imperial Act, while an author of books published in any country included in the copyright union was assured copyright in the Empire for the same period as he had it in his country of publication. This copyright was auto-

<sup>1</sup> 38 & 39 Vict. c. 53.

matic, excluding any idea of requirements of local printing or publication. The Imperial Act of 1886 was made operative in Canada by Order in Council of 28 November 1887; but in 1889 the Governor-General forwarded an Act (c. 29) which, however, was only to come into force on proclamation by the Governor-General, and asked for authority to proclaim the Act. The Act offered copyright in Canada for twenty-eight years on condition of printing there: if the offer was not accepted, any person might obtain a licence to reprint on paying 10 per cent. on the retail price, and, if sufficient copies were made available, all importation might be prohibited, save of books enjoying copyright in the United Kingdom and lawfully printed and published there. It was requested, of course, that the convention should be terminated as regards Canada, as it was clearly not in accord with the policy of the Act, and was proving of no gain to Canada.<sup>1</sup> Lord Knutsford<sup>2</sup> simply refused the request to permit the Act to become operative, or to denounce the convention for Canada, and his grounds were simply that publishers held that a month was much too short a time for them to obtain copyright in Canada, and that they objected to the licence system. He held that the matter must stand over, pending the outcome of negotiations for a convention with the United States.

In 1891 the United States<sup>3</sup> conceded a copyright conditional on printing, but only in cases where local copyright in other countries was given to the citizens of the United States on the same terms as to subjects of that country, and the privilege was accorded to British subjects on an assurance from the Imperial Government that copyright could be obtained in the United Kingdom by mere publication, and in other possessions was accorded on the same conditions as to British subjects. In effect what was meant was that by mere publication at London an American citizen obtained copyright in Canada, whereas a British subject had to print in the United States to obtain copyright. Canada again pressed for the termination of her bondage, and her case was considered by a department committee<sup>4</sup> representing the Foreign and Colonial Offices and the Board of Trade, which reported strongly against accepting

<sup>1</sup> *Parl. Pap.*, C. 7783, pp. 4-9.

<sup>3</sup> *Ibid.*, C. 6425.

<sup>2</sup> *Ibid.*, pp. 12 f.

<sup>4</sup> *Ibid.*, C. 7783, pp. 43-56.

her views. The report is an amazing document regarded as dealing with the affairs of a self-governing Dominion. It is conceived wholly in the interests of the British publisher; the United States might resent the loss of the Canadian market, the British author would lose automatic copyright in Canada, and the policy of the British Government was to make copyright irrespective of place of printing, as if that consideration mattered when the United Kingdom had just had to admit that the United States was entitled to insist on printing. The Imperial Government was advised to remedy a certain amount of grievance in Canada by admitting the principle of the issue of licences in respect of works which had copyright in the Dominion, but were not within twelve months produced there at a price suitable to Canadian conditions, but the royalty should be 15 per cent. The Dominion Government on 10 and 24 February 1894 replied to the views of the Imperial Government and the committee by insisting on its unquestioned right to have its adherence to the treaty of 1886 revoked, and by controverting the arguments of the committee. Was it contended that the rights of Canadian copyright holders were to continue to be set up as a bar to the rights of the Canadian people and Canadian Parliament, when it had been repeatedly recognized that the existence of that privilege had become a grievance in Canada, and assurances had been given that the grievances would be redressed? On 30 March 1894<sup>1</sup> Lord Aberdeen reported that his Ministers had decided no longer to collect the 12½ per cent. duty levied on foreign imprints of British copyright works on importation into Canada, thus depriving the owners of copyright of any returns from such reprints, but at the same time, as pointed out by the Imperial Government, rendering it legally impossible to introduce such reprints into Canada, as s. 17 of the Imperial Act of 1842 was automatically revived on the repeal of the Canadian provision to levy the duty. The matter must have come to a serious conflict, but Sir John Thompson, who had taken up the matter from the constitutional point of view, died suddenly in December 1894 at Windsor, and the Conservative Government, distracted with internal difficulties, was in no condition to renew the struggle. On the other hand, the Imperial Government

<sup>1</sup> *Parl. Pap.*, C. 7783, p. 78.

was anxious to secure Canadian adherence to the new convention arranged at Paris in 1896, in connexion with which Mr. Hall Caine in 1895 and Mr. Thring in 1899 paid visits to the Dominions. In 1900 a compromise on a small point was reached ; where a book which had copyright in Canada had been produced in some part of the British Dominions other than Canada, then on proof of the issue of a licence to reproduce the work in Canada, the importation of any other copies of the work might be prohibited, thus securing protection for a Canadian publisher. In 1901 Mr. Mills, Canadian Minister of Justice, discussed the situation with Mr. Chamberlain, but no result was reached. In 1902-3 the Canadian Courts decided in *Imperial Book Co. v. Black* <sup>1</sup> that it was no longer legal to import into Canada reprints in America of British copyright works, in that case the ninth edition of the *Encyclopædia Britannica*. The ground of the decision was simple ; the prohibition of s. 17 of the Act of 1842 was suspended by Order in Council under the Act of 1847, for such period only as arrangements were in force in Canada for collecting a duty on imported reprints for the benefit of the author, and, when that lapsed, the Order in Council ceased to operate. The Privy Council refused leave to appeal, showing that it agreed with the decision, and in 1903 its decision in *Graves v. Gorrie* <sup>2</sup> showed that the *Fine Arts Copyright Act* did not apply beyond the United Kingdom, so that protection for British authors in respect of pictures, drawings, and photographs, probably also sculpture and engraving, did not exist in the Dominions. Moreover, the need of revision of the International Convention led to a Conference at Berlin in October and November 1908 which produced vital changes in the Convention. The matter was first considered in England by a strong committee under Lord Gorell, and then by a subsidiary Imperial Conference <sup>3</sup> which resulted in resolutions in favour of a new Imperial Act to extend to all the Empire, save to the self-governing Dominions, which were to be free to declare it in operation subject to changes as regards procedure and remedies. If any Dominion adopted the Act, it

<sup>1</sup> 35 S. C. R. 488 ; (P. C.) 21 T. L. R. 540. The argument that s. 152 of the *Customs Consolidation Act*, 1876, applied to Canada was rejected in view of s. 151, as Canada had made full provision as to her customs (s. 151).

<sup>2</sup> [1903] A. C. 496.

<sup>3</sup> *Parl. Pap.*, Cd. 4976, 5051, 5272.



would be at liberty to withdraw thereafter, subject to any treaty rights and having regard to acquired rights of authors. But a Dominion which passed substantially identic legislation, save as regards procedure or remedies or works first published locally, should be treated as if it were a Dominion to which the Act applied. A Dominion which neither adopted the Act, nor passed substantially identic legislation, should not be entitled to claim any rights save such as might be accorded in the United Kingdom by Order in Council, or in a Dominion by order of the Governor in Council. Any colonial Legislature should be entitled to make its own provisions as to remedies and procedure, and could also modify the Imperial Act as regards authors resident in the Colony or books first published therein. Copyright under the Imperial Act should be granted only to works the author of which was a British subject, or *bona fide* resident in some part of the Empire to which the Act extended, or was a subject or citizen of or resident in a foreign country in which due provision was made for respect being paid to the rights of British authors, the extension to such foreign works of the Act to be made by order of the Governor in Council in the case of the Dominions. It was also agreed that it should, if possible, be made clear on ratification of the Convention of 1908 that the privileges accorded applied only to subjects or citizens of, or residents in, Union countries, and not to works merely published there by subjects of non-Union countries. This scheme was carried out in the *Copyright Act*, 1911. It was further decided that on the coming into operation of the new Act all older Imperial legislation should be repealed, save that it should apply to any Dominion to which the new Act did not extend, until formally repealed by the Dominion. The addition of this provision resulted in making a distinctly complex condition of affairs under the new Act. The simplest case of all is where the Imperial Act applies, either *proprio motu*,<sup>1</sup> or on acceptance by the Dominion Parliament, as in the case of the Commonwealth by Act No. 20 of 1912, the Union of South Africa by Act No. 9 of 1916, and Newfoundland (c. 5 of 1912); in these instances Orders in Council extending the rights under the Act to foreign countries with or without

<sup>1</sup> It is in force in the Irish Free State under the Constitution, s. 73, and the *Adaptation of Enactments Act*, No. 2 of 1922, in Malta and Southern Rhodesia.

limitation are made by Imperial Order in Council, or in the Dominions by orders of the Governor in Council. In a second class fall cases in which the Act is not adopted, but, as in New Zealand by Act No. 4 of 1913, similar provisions are prescribed, which permit of the Dominion being treated as if it were a possession to which the Imperial Act extended. Thirdly, if neither condition is fulfilled, it is still possible for privileges to be conferred by Order in Council on works first published in the Dominion in question, or authors resident therein at the time of making their works, in return for protection for works by British subjects not resident in the Dominion. Curiously enough, it was necessary to protect at first both Canada and the Union by such Orders in Council, as both delayed legislation. Canada indeed was extremely slow to move after obtaining freedom, because her printers were adverse to the whole idea of the convention. As an inducement to the Dominion to accept the Convention of 1908 a protocol was signed at Berne on 20 March 1914, which authorized any power to refuse the benefits of the convention to authors being subjects of non-Union states which did not afford adequate protection to works of members of the Union, if such authors were not *bona fide* residents of Union countries.<sup>1</sup> In 1919 and 1920 Bills in Canada raised controversy, and the Canadian Authors' Association was founded to resist the proposals which became law in 1921 (c. 24). Under this Act the whole scheme of the Berlin Convention, which Canada had accepted, was upset by the provision (s. 13) that, if a book were not printed in Canada in sufficient quantities to satisfy the Canadian public, a licence might be given for publication on payment of a royalty, and similarly licences might be given for serial publication of serials. The International Bureau at Berne pointed out convincingly that the proposal contravened the convention, and the Government of Mr. Meighen consented to undertake not to proclaim the Act, but first to secure amendment. The promise was repeated by Mr. King, and kept in June 1923 (c. 10), when the chief Act was amended by applying the licensing sections only to Canadian citizens, exempting from it all other British subjects, and subjects and citizens of countries members of the Union. It is not surprising that the Canadian Authors had no great joy at this provision

<sup>1</sup> *Parl. Pap.*, Cd. 7613.

to their detriment, and the passage of the Act was marked by very little comprehension of the constitutional position. Canada, as a result, became entitled to rank as a country in which identic legislation was in force, like New Zealand. The Act of 1911<sup>1</sup> applies of course to Malta and Southern Rhodesia and cannot be altered by these territories, but the Irish Free State has the powers of a Dominion if it desires to make use of them.

<sup>1</sup> For the non-retrospective effect of this Act on the *Dramatic Copyright Act*, 1833, see *Falcon v. Famous Players Film Co.* (1926), 42 T. L. R. (C. A.), 666. See also *S. R. & O.*, 1923, p. 168 ; 13 Geo. V, c. 1, s. 3.

## IX

### DIVORCE AND STATUS

THE comparatively minor question of divorce still forms one of the instances in which reservation is required by the royal instructions to the Governors of the Australian States, Newfoundland, and the colonies of Malta and Southern Rhodesia, and control was exercised in this respect long after internal matters as a rule were not a subject of comment. A Victoria Bill of 1860 was not assented to, but was allowed to stand in 1864 ;<sup>1</sup> New South Wales Bills of 1877 and 1879 similarly failed to become law, but an Act of 1881 (No. 31) was allowed to have effect. A Bill of 1887 was objected to on the score that it was inconvenient to have different divorce laws in different parts of Australia, and that it did not insist on domicile as the test of jurisdiction, thus creating confusion and exposing persons who remarried after divorce to the penalties of bigamy and their children to illegitimacy.<sup>2</sup> In 1889 Victoria introduced new grounds of divorce, including drunkenness, coupled with failure to support, or cruelty, by the husband, or neglect of domestic duties by the wife ; desertion for three years ; a commuted death sentence or sentence of seven years' penal servitude ; murderous assault ; repeated adultery by the husband, or within the conjugal residence, or in circumstances of aggravation. Domicile was to subsist for two years before petition, but a deserted wife retained her domicile,<sup>3</sup> and no petition might be brought by persons resorting to the Colony to seek divorce. The Act was assented to after representations had been made by the Australian Agents-General in its support. The Colonial Secretary justified his change of attitude by the view that the Act was passed after an election, where it had figured as an issue ; that it was approved generally in Australia ; and that domicile was the guiding test of jurisdiction, the specification of two years being explained to mean that genuine domicile

<sup>1</sup> *Parl. Pap.*, H. C. 196, 1894, pp. 8 f.

<sup>2</sup> See *Parl. Pap.*, C. 6006 ; H. C. 144, 145, 1894 ; Cd. 1785 ; New South Wales *Deb.*, xxv. 260, 1079, 1605 ; Victoria *Deb.*, lxii. 314, 827 ; Dilke, *Problems of Greater Britain*, ii. 282 ff. For Victoria now cf. No. 3282 (1923).

<sup>3</sup> So also in Tasmania, 1919, No. 65 ; Western Australia, No. 7 of 1912.

must have existed for that period and still subsist, as opposed to mere domicile of choice acquired on settling in the Colony. New South Wales then re-enacted the measure of 1887, which became law as No. 32 of 1892, and gradually similar rules have been adopted in the rest of the States. There has been in certain cases a further departure from domicile than in that of the deserted wife, which even now presents some difficulties. Thus, in New South Wales, Act No. 14 of 1899 allows any husband (s. 12) to petition for divorce on the score of adultery, and s. 13 gives him the right to petition on grounds similar to those in the Victorian Act of 1889 on the score of three years' domicile. This might be explained merely as a distinction between mere domicile (s. 12) and continued domicile, but in the case of the wife (ss. 14–16) there are three alternatives: any wife; any wife whose husband is domiciled; and any wife domiciled for three years. It is clear, too, that under s. 11 of that Act desertion might be proved merely by a collusive action for restitution of conjugal rights, as was found possible in New Zealand under the Act of 1898, which was amended to prevent this in 1907, No. 78, but under No. 70 of 1920 and No. 65 of 1921 divorce on this ground is still possible;<sup>1</sup> other grounds are adultery, bigamy, desertion, drunkenness with or without cruelty or failure to maintain, insanity, separation with or without desertion, and combinations of these.

In Canada divorce legislation was given to the federation, and thus the situation was long anomalous, Nova Scotia, New Brunswick, Prince Edward Island, and British Columbia having from pre-federation days divorce courts; Ontario, Quebec, and the rest of Canada including, when created, Manitoba, Saskatchewan, and Alberta none. Judicial decisions,<sup>2</sup> however, established the right of the prairie provinces to have such jurisdiction under English law as introduced into them on establishment, so that Ontario and Quebec alone remain compelled to have recourse to Parliament, in which the Senate exercises very badly a sort of jurisdiction, its views being seldom upset in the Commons. Efforts to create Courts in all provinces have failed before the objection of Quebec, but in

<sup>1</sup> Contrast Western Australia No. 52 of 1921 amending No. 33 of 1920. For Queensland divorces, see No. 38 of 1923.

<sup>2</sup> *Walker v. Walker*, [1919] A. C. 947; *Board v. Board*, *ibid.*, 956.

1925 equality as to causes of divorce was accorded by law for the benefit of the prairie provinces, which had only the English law of 1857, while the Parliament and the Maritime Provinces and British Columbia had a more generous law : indeed, Nova Scotia, as became its name, by 32 Geo. II, c. 17, gave divorce for desertion, but this, as repugnant to English law, was disapproved and replaced by 1 Geo. III, c. 7. Newfoundland also, like Malta, has lagged behind in divorce legislation by reason of the strong Roman Catholic element in the population.

It is clear that in any territory divorce of non-domiciled persons, if authorized by law, is valid within that territory, but it is also clear that under English law, with the possible exception of the deserted wife, the divorce of non-domiciled persons is a nullity ; the *Harris* divorce bill of Upper Canada was never allowed in 1845 on this score, and the Dominion Parliament usually inserts in Divorce Acts a recital of domicile, which, of course, would not be binding on other jurisdictions, but would doubtless have great weight as to the fact. Domicile is normally insisted on in the Canadian Parliament, save as regards deserted wives ;<sup>1</sup> but, while the Courts of the Colonies have normally accepted the doctrine of domicile as the basis of jurisdiction, there have been exceptions, and the decision in *Le Mesurier v. Le Mesurier*,<sup>2</sup> though practically decisive, was still questioned. But the decision in *Attorney-General for Alberta v. Cook* must be deemed to have disposed of the matter for good ; it is now clear<sup>3</sup> that, unless a statute expressly specifies cases in which domicile is not requisite, jurisdiction must proceed on domicile, with only a possible exception in that the Judicial Committee left it open whether a Court, by

<sup>1</sup> e. g. 62 & 63 Vict. c. 133 ; 9 & 10 Edw. VII. c. 100 ; *Ash* divorce case, *Commons Deb.*, 1887, p. 1022 ; *Stevens v. Fisk*, 8 L. N. 42 ; contrast the *Harris* case, *Parl. Pap.*, H. C. 529, 1864, p. 28. See for New Zealand, *Ryley v. Ryley*, 4 J. R. (N. S.), C. A. 50 ; *Armstrong v. Armstrong*, 11 N. Z. L. R. 201 ; *Poingdestre v. Poingdestre*, 28 N. Z. L. R. 604 ; Victoria, *Hoamie v. Hoamie*, 6 V. L. R. 113 ; Western Australia, *Ripper v. Ripper*, *West Australian*, 2 July 1907 ; Natal (under Law No. 18 of 1891), *Thomas v. Thomas*, 23 N. L. R. 38 ; *Wright v. Wright*, 26 N. L. R. 651 ; *Sandberg v. Sandberg*, 27 N. L. R. 684. For English dicta see *Deek v. Deek*, 2 Sw. & Tr. 90 ; *Armytage v. Armytage* [1898] P. 178 ; Dicey and Keith, *Conflict of Laws* (ed. 4), pp. 889, 896.

<sup>2</sup> [1895] A. C. 517.

<sup>3</sup> (1926) 42 T. L. R. 317 ; cf. *Hastings v. Hastings*, [1922] N. Z. L. R. 273.

estoppel or other device, might not forbid persons domiciled to escape jurisdiction by a man deserting or leaving his wife and taking a new domicile of choice. This agrees with the decision arrived at in an Indian case<sup>1</sup> where it was held that the vague term 'residence' must be construed as 'be domiciled', and Acts had to be passed in 1921 and 1922 to validate divorces without domicile in India and Kenya, where a similar interpretation of residence as giving jurisdiction had been acted on. These Imperial Acts, of course, are sufficient to secure recognition of such divorces anywhere in the Empire, and the same remark applies to every divorce in respect of Ireland granted by Imperial Act. The Irish Free State Parliament has declined to allow of private Acts for divorce being discussed in the Dáil, and it is dubious if persons domiciled in the Free State can possibly secure Acts of the Imperial Parliament on their behalf. It may be added that in the case of many jurisdictions domicile has always been more or less strictly insisted on, as in the Cape,<sup>2</sup> the Transvaal,<sup>3</sup> Orange River Colony,<sup>4</sup> New Zealand, &c.

Marriage with a deceased wife's sister was rendered desirable by social conditions in early Australia, and South Australia sought to enact it in 1860, 1863, 1870, and 1871, when at last it was allowed to become law (No. 21). Its example was followed in the other Australian colonies, New Zealand (1880), and Canada (1882), where in 1890 permission was extended to marriage with a niece of a deceased wife. The Cape in 1892 (No. 40) followed the Canadian model, and New Zealand in 1900 set the example as regards a deceased husband's brother, which has been followed in the Union (No. 17 of 1921), with extension to a nephew in Canada in 1923 (c. 19), Southern Rhodesia (No. 4 of 1925), and elsewhere. Considerable difficulty arose in England as to such marriages. If the couple were not

<sup>1</sup> *Keyes v. Keyes*, [1921] P. 204; Keith, *J. C. L.* iii. 312.

<sup>2</sup> *Peters v. Peters* (1899), 9 C. T. R. 289; *Ex parte Bright* (1902), 12 C. T. R. 299; *Wright v. Wright* (1903), 13 C. T. R. 881; *Ex parte Levy* (1906), 16 C. T. R. 1041. Contrast *Jooste v. Jooste*, 17 C. T. R. 385; *Mason v. Mason*, 4 E. D. C. 330; *Thurgood v. Thurgood*, 17 N. L. R. 49.

<sup>3</sup> *Murphy v. Murphy*, [1902] T. S. 179. For Natal, *Steer v. Steer*, 16 N. L. R. 237; *Friedman v. Friedman*, 23 N. L. R. 25.

<sup>4</sup> *Potgieter v. Potgieter*, [1904] O. R. C. 40; *Ex parte Steward*, [1907] O. R. C. 37. So also *Parker v. Parker*, 5 C. L. R. 691; *Brook v. Brook*, 13 N. S. W. L. R. Div. 9.

domiciled in the Colony, then their marriage would be held utterly invalid, their children illegitimate; if they were so domiciled, their offspring could not inherit land or a title. Strong representations in favour of recognition were made by the Agents-General in 1896, by the Premiers at the Colonial Conference of 1897; the Commonwealth in 1904 made an appeal, and Lord James of Hereford pleaded for reform on 13 July 1905. It remained, however, for the Liberal Government to yield, and by Act of 1906 to recognize the validity for all purposes of colonial marriages of persons there domiciled, while in 1907 marriage was permitted in the United Kingdom also.<sup>1</sup>

Doubt exists as to the position in England of the offspring of marriages contracted in cases where English law does not recognize the marriage. It is awkward that in certain cases, as in Western Australia<sup>2</sup> and Tasmania,<sup>3</sup> the Acts for the legitimation of children permit such legitimation despite the fact that the parents could not legally have intermarried at the time. This permission, which is contrary to Scottish law and sound morality, has unfortunately found defenders even in England, but has been rejected by the House of Lords from the Legitimacy Bill of 1926.<sup>4</sup>

<sup>1</sup> *Parl. Pap.*, Cd. 2398; *Hansard*, ser. 4, cxlix. 524 ff.; clvii. 316 ff., 1548 ff.; clxxx. 1423 ff.; 6 Edw. VII, c. 30; 7 Edw. VII, c. 47.

<sup>2</sup> No. 44 of 1909, assented to after reservation.

<sup>3</sup> 5 Edw. VII, No. 3. The other Acts followed the Scottish rule, and that of Quebec (Code, ss. 237-9) and of South Africa. But the Canadian provinces are deviating from that rule. For Ceylon, cf. *Rabot v. De Silva*, [1909] A. C. 376, 382. See Dicey and Keith, *Conflict of Laws* (ed. 4), pp. 530 ff.

<sup>4</sup> The Bill to extend the powers of Indian and Crown Colony legislatures to divorce persons domiciled in England and Scotland in 1926 is criticized in Dicey and Keith, op. cit., pp. v, 897 ff. As a war temporary measure English Courts were allowed to divorce persons of Dominion domicile where that was allowed by Dominion legislation (9 & 10 Geo. V, c. 28; Commonwealth, No. 15 of 1919), but these Acts are spent. See now 16 & 17 George V, c. 40; Keith, *J. C. L.* viii. 288; ix. 128.



## MILITARY, NAVAL, AND AIR DEFENCE

§ 1. *Military Defence up to 1914*

LORD DURHAM in his report did not contemplate the relaxation of military control of the Colonies, and the Imperial Government continued for years to bear the chief burden of their defence. The Crimean War evoked some signs of readiness to sympathize with the Empire ; Canada, Nova Scotia, and New Brunswick voted grants for the aid of widows and orphans, and gave assurances of willingness to rely on militia, if it were deemed necessary to withdraw the Imperial forces from their garrison ; New South Wales, Victoria, raised some volunteers ; South Australia contemplated a militia, and New Zealand honestly admitted that, young, feeble, remote, it could add but little to ' its unalterable attachment and true and faithful allegiance '. In 1858 a further step was taken, for a battalion was raised for the Imperial forces in Canada, but the depot was kept there only for three years, and the battalion soon ceased to be Canadian in personnel. The cost of the defences of the Empire fell entirely as regards Imperial forces on the Imperial Government ; in 1858 the total was some £4,000,000, of which £380,000 only came from the Colonies. A departmental committee in 1859 reported against the system as regards the self-governing colonies, and two Committees of the House of Commons investigated the issue. The propriety of exacting larger contributions had been already laid down by Lord Grey, who in anticipation of responsible government had arranged with New South Wales, Victoria, and South Australia, that the Imperial Government should pay only for such forces as it considered necessary, the Colonies to raise locally or pay for further Imperial forces supplied at their request. In Canada, similarly, in 1851, notice was given that Imperial garrisons would be reduced, and the importance of improving the militia was urged. The Crimean War strengthened the movement by showing the danger of dissipation of forces, and the advantage of volunteer organizations for home defence. It appeared from the investigations of the departmental committee that only

in Canada, Nova Scotia, New Brunswick and Prince Edward Island, the Cape and Victoria, were there any militia or volunteer forces, while most of the cost of defence falling on the Colonies was borne by New South Wales and Victoria, where the gold boom enriched the Colony. The Select Committee of 1861 was greatly aided by Mr. Gladstone in formulating a moderate policy, which insisted on the wisdom of concentrating Imperial forces, the propriety for self-governing Colonies reverting to the old tradition of self-reliance in local defence, and the justice of reducing Imperial expenditure, subject always to due protection from dangers arising from Imperial policy. Finally, on 4 March 1862,<sup>1</sup> on the motion of Mr. A. Mills, the House of Commons resolved

that this House, while it fully recognizes the claims of all portions of the British Empire on Imperial aid against perils arising from the consequences of Imperial policy, is of opinion that Colonies exercising the rights of self-government ought to undertake the main responsibility of providing for their own internal order and security, and ought to assist in their own external defence.

In pursuance of this rule the Duke of Newcastle informed in 1863<sup>2</sup> the Australian Colonies that the Imperial Government must charge £40 for each infantryman up to the number deemed necessary by the Imperial Government, while any additional men must be paid for at the more reasonable rate of £70 a year. But events strengthened the desire to remove rather than have the troops paid for. In New Zealand, Sir G. Grey<sup>3</sup> had decided to entrust native policy to ministers, thus reversing the plan of retention in the Governor's hands, which for lack of funds and executive officers was, he argued, impossible. In fact he probably desired to direct policy by controlling his ministers, while evading Imperial checks on the plea of ministerial advice. Mr. Fox's Ministry, however, was defeated on 26 July 1862 by the casting vote of the Speaker

<sup>1</sup> *Hansard*, ser. 3, clxv. 1032-60.

<sup>2</sup> *Parl. Pap.*, C. 459, pp. 2 f. Cf. Earl Grey, *Colonial Policy*, i. 355 ff., 260 ff. (Canada); Adderley, *Colonial Policy*, pp. 44 f., 380 ff.; Ewart, *Kingdom of Canada*, pp. 169-213; Morris, *Memoir of George Higinbotham*, pp. 204-9; Jebb, *Colonial Nationalism*, pp. 103 ff.

<sup>3</sup> Henderson, *Sir George Grey*, pp. 217 ff.; Collier, pp. 108 ff., 150 ff.; Adderley, op. cit., pp. 146 ff.; *Parl. Pap.*, Aug. 1862; 3 March, June 1864; 2 March 1865; 26 June 1866; C. 83; H. C. 307, 1869.

on the motion to take over responsibility, and Mr. Domett's Ministry, on 19 August, insisted that the responsibility was the Governor's. The Imperial Government, however, was firm ; it reiterated its decision to relinquish control on 26 February 1863, and the General Assembly accepted this in November 1863. But there arose disputes between the Governor and Ministers resulting in the resignation of the Fox-Whitaker Ministry in 1864, and the Governor was informed by the Imperial Government that, as the war was being waged by Imperial forces, he was entitled to insist on his own views as to detention of prisoners and speedy trial, as well as regarding confiscation of their lands. But the Governor offended the Imperial Government by quarrelling with the commander of the Imperial forces, and was finally informed that he must regard all save one regiment as not under his control in any way. He protested, and tried to argue that under the constitution he was legally in control of all forces in the Colony and could not be deprived of this position by any decision of the Imperial Government, an absurd claim. Ministers again, in 1868, changed their tactics, and asked for retention of Imperial troops ; but they would not pay, and the Imperial Government was resolute against consenting to maintain a force for use at the pleasure of the Colony, at Imperial expense, thus rendering the Imperial Government tributary to the Colony.<sup>1</sup> The War Office again proposed that the officer commanding the Imperial forces should be given command over the local forces, but the Colonial Office successfully objected that this would be a negation of colonial control of the operations, and that the most that could be required was that he should command a joint operation.<sup>2</sup> Finally, the last battalion was removed in February 1870, and it was withdrawn even from Australia in August 1870, leaving the Colonies to their own resources. The New Zealand episode proved conclusively the absurdity of entrusting Imperial troops for use in operations arising out of a policy which Imperial authorities did not control. The sympathy expressed with New

<sup>1</sup> *Parl. Pap.*, H. C. 467, 1863, p. 242 ; July 1864, p. 18 ; 2 Feb, 1865, pp. 117 ff., 197 ; H. C. 307, 1869, pp. 232 ff., 420, 522 ff.

<sup>2</sup> *Parl. Pap.*, H. C. 307, 1869, p. 443. Later, in 1881, the Ministry claimed the right to move the colonial troops without regard to the Governor ; C. 3382, p. 190 ; Rusden, *New Zealand*, iii. 406.

Zealand at being deserted in a struggle against savage natives was ludicrously misplaced ; the natives had never more than a few hundred armed men in the field, and the inhabitants were throughout in a position of overwhelming superiority, while the policy of confiscation was popular as providing excellent lands for settlers.

The position of Imperial forces in a Colony did not cause any difficulty in Canada. In 1855 the Crimean war led to the passing of an Act reconstituting the old militia, but in 1862 a more serious measure was defeated, much to the disappointment of military opinion in England, which looked with anxiety to the possibility of difficulties with the United States, brought nearer by the Fenian inroad of 1866. By that time an Act of 1863 had provided for a volunteer militia in addition to the ordinary militia, and in the Red River expedition of 1870 militia forces from Ontario and Quebec served with the Imperial troops. In 1871, however, the Imperial troops disappeared from Canada save at Halifax and Esquimalt, where they remained as Imperial garrisons. On the outbreak of the South African war Canada raised a force to relieve the battalion of the line at Halifax ; moreover, in 1902, at the Colonial Conference, and in 1905, it undertook to bear the cost of the garrisons there and at Esquimalt, and in 1906 the garrisons were replaced by Canadian forces.<sup>1</sup> In 1868 on federation the militia was again reorganized, the obligation being continued on all male British subjects between 18 and 60 to be called out for active service within or without Canada whenever it appeared desirable on the score of invasion, war, or insurrection, or danger of any of them. But the real system was purely voluntary and the absence of the Imperial forces led to a decay in military spirit and training, though in 1883 it was provided that the officer commanding the forces, who was given in 1871 the rank of major-general, should always be an Imperial officer. But the device served no very useful purpose, for Imperial officers could not remember that they were, when in Canada, merely Canadian servants, and Lord Dundonald was removed in 1904<sup>2</sup> because he had, in his zeal for reforms and great indignation at the purely political

<sup>1</sup> *Parl. Pap.*, Cd. 2565 ; *Canadian Annual Review*, 1905, pp. 459 ff.

<sup>2</sup> Skelton, *Sir Wilfrid Laurier*, ii. 198 ff. Dundonald acted foolishly, but the Minister was even less excusable. Cf. Macdonald, *Corr.*, pp. 473-6.

interference of a minister in an appointment, practically attacked the Dominion Government.<sup>1</sup> A Militia Council with an inspector-general, who might be an Imperial or Canadian officer, had been authorized by the Militia Act of 1904, which also restricted the calling out of the force to the defence of Canada. It was then substituted for the officer commanding the forces, and first Sir Percy Lake, and from 1910 a Canadian officer, Major-General Otter, held the post. In 1910 Sir John French<sup>2</sup> visited the Dominion and reported on the forces, urging that the maintenance of the voluntary system demanded effective training, an increase of staff, an insistence on the qualifications laid down for officers and men alike, and preparations for mobilization.

In Newfoundland the withdrawal of the Imperial forces led to a complete abandonment of military preparations.

In Australasia the withdrawal of the forces led to sporadic efforts<sup>3</sup> to create local forces, always voluntary, sometimes paid, a small permanent nucleus gradually being achieved in New South Wales; Victoria, where the name militia was introduced in 1883-4; South Australia, which renamed thus her paid volunteers in 1886; and Queensland, whose first permanent force dates from 1884; while New Zealand in 1886 created a small permanent force. Under the advice of Sir W. D. Jervois and Colonel Scratchley, in 1870-80, something was done for defence fortifications, and the Russian tension in 1877 promoted action. As a result of the Colonial Conference of 1887, Major-General Bevan Edwards reported on the Australasian defences, and suggested federation in military matters to include New Zealand. In 1893 Colonel Hutton was asked to command the New South Wales forces, and he worked out further proposals for their improvement as a basis for a later federation. But, pending that, there was small disposition to move, and Mr. Chamberlain's suggestions in 1897 at the Colonial Conference<sup>4</sup> for the interchange of regiments led to no warm response. In 1900, however, Mr. Seddon secured the passing in New Zealand

<sup>1</sup> *Commons Deb.*, 1904, pp. 4580 ff.

<sup>2</sup> *Canada, Sess. Pap.*, 1911, No. 35 a; General Lake's comment is in 35 b. Cf. *Canadian Annual Review*, 1909, pp. 275 ff.; 1910, pp. 585 ff.

<sup>3</sup> *Commonwealth Official Year Book*, ii. 1075 ff.

<sup>4</sup> *Parl. Pap.*, C. 8596.

of an Act allowing the establishment of an Imperial reserve which might be used outside the Colony, at Imperial expense or partly at Imperial and partly at colonial expense, but in either case subject to a special approval of the colonial legislature. In 1901 federation rendered reorganization of the Commonwealth forces possible, and at the Colonial Conference<sup>1</sup> of 1902 Mr. Seddon moved in favour of the principle of the establishment in each Colony of an Imperial reserve for service outside, the limits and conditions of such service and arrangements for pay to be determined by agreement. The proposal was supported by the Cape and Natal, but condemned by Canada and the Commonwealth as contrary to self-government, and, therefore, it fell to the ground, even Mr. Seddon dropping it as far as concerned his Colony. In the Commonwealth, however, under the auspices of the Labour party, legislation was passed in 1903 and 1904 imposing on all male inhabitants the duty of service in the Commonwealth in time of war with the defence forces, the liability extending from 18 to 60 years. Major-General Hutton had, after a stormy period of work in Canada,<sup>2</sup> where he paved the way for the change in 1904 by disagreeing with ministers, returned to Australia to work out a scheme. He fell foul of the Commonwealth Government, and Act No. 14 of 1904 marked the end of the command-in-chief and the substitution of a Council of Defence, with an inspector-general and a military board. In New Zealand in 1906, by Act No. 41, a similar policy of having a Council was adopted, but in 1910 the powers of the Council were handed over to the commandant of the forces. Meanwhile the pressure of external affairs had resulted in the growth of the demand for compulsory service. It was provided for timidly and restricted to those under 21, to the exclusion of voters, in the Commonwealth and the Dominion by Acts No. 15 and No. 28 of 1909, but Lord Kitchener's visit to both in that year led to the determination to proceed further, and Acts No. 37 and No. 21 of 1910 respectively established the principle of compulsory training from age 12 to age 25.<sup>3</sup>

<sup>1</sup> *Ibid.*, Cd. 1299.

<sup>2</sup> *Commons Deb.*, 1900, pp. 594 ff., 2671 ; *Sess. Pap.*, No. 71.

<sup>3</sup> See *Parl. Pap.*, Cd. 5135, 5582 ; *Commonwealth Parl. Pap.*, 1910, Nos. 48, 59 ; *New Zealand Parl. Pap.*, 1910, H. 19 A ; 1911, H. 19.

In South Africa the Imperial Government proposed<sup>1</sup> in the period 1869–72 to withdraw the Imperial forces save as regards a garrison for Simon's Bay, but the discovery of diamonds opened up disturbing prospects which were not improved by difficulties in Basutoland, foolishly annexed to the Cape in 1871 and wisely disannexed in 1883, by the revolts of the Zulus, and consequent on them the annexation of the Transvaal, the rebellion, the disannexation, and so on. When Natal was given self-government, the removal of the Imperial forces in five years was talked of,<sup>2</sup> but the beginnings of strained relations with the Boer republics prevented that consummation, an assurance of unqualified aid against external attack being given in 1899,<sup>3</sup> and after the war withdrawal seemed still less possible. Even when union was arranged, the Government of the day showed no eagerness for the disappearance of the troops whose presence could be justified on the ground of Imperial naval interests and the Imperial responsibility for Bechuanaland, Basutoland, Swaziland, and Rhodesia. But by the *Defence Act*, 1912, there was introduced a system of compulsory service<sup>4</sup> in South Africa in defence of the Union for all male adults being Europeans from 17 to 50, with compulsory training from 21 to 25, though it might begin at 17.

The presence of Imperial beside Colonial troops under two different commands naturally enough evoked difficulties, seen in complete form in the Cape in 1877–8. Sir Bartle Frere was anxious, in the face of native risings, to use the Imperial forces; the Ministry wished to rely on local forces, to manage the war themselves without intervention of the Governor, who insisted that as Commander-in-Chief he was entrusted with responsibility of a special order, through a Minister of the Crown, and to exclude Imperial intervention as contrary to local self-government. In doing so they unquestionably made appointments without the Governor's sanction and authorized military operations without his consent, and his action in dismissing them was upheld by the legislature, for Mr. Gordon Sprigg accepted office, assuming responsibility for the Governor's action and secured a majority. It is only fair to say that the Governor had somewhat strange ideas of his responsibility as

<sup>1</sup> *Parl. Pap.*, C. 459, 708, 732.    <sup>2</sup> *Parl. Pap.*, C. 6487, p. 2.    <sup>3</sup> *Ibid.*, Cd. 44.

<sup>4</sup> First in Natal, Act No. 36 of 1903; No. 30 of 1905; No. 36 of 1906.

Commander-in-Chief under his commission, and that his claim to be entitled to place the colonial forces under Imperial control was not one which had any constitutional foundation, the Imperial forces being in the Colony for purposes of defence of Imperial stations, not to put down native risings in the Cape itself.<sup>1</sup> The antagonism of ministers and Governor prevented either side taking a calm view of the facts. In the war of 1899–1902, on the other hand, the colonial forces were put effectively under the control of the Imperial Government and co-operated successfully.

In all these cases the local forces were regulated entirely by local Acts, and directed on principles of ministerial responsibility. The Governor indeed held the position of Commander-in-Chief under his commission—the title in England was dropped in 1793, but has lingered on abroad—but this gave him no authority whatever of a military character. On the other hand, the Acts gave powers sometimes in such a form as to suggest individual responsibility. Thus in 1872 Sir H. Robinson found himself attacked in the Assembly for his action regarding one Rossi, which had been taken on the strength of assurances of the law officers that under Act No. 5 of 1867 he was required to exercise personal responsibility in matters affecting the dismissal of officers. He very sensibly urged alteration of the Act to take away a duty which was not justified. Similarly, Sir B. Frere could rely on various provisions in Cape Acts which were susceptible of being interpreted as giving a discretion to the Governor. These matters, of course, disappeared in the Federation and Union Acts.

The office of Commander-in-Chief was alleged by Sir G. Grey, when in conflict with the Imperial Government in New Zealand, to give him power over Imperial forces as such. This was plainly absurd,<sup>2</sup> and the power which the Governor has in regard to such forces rests simply on the principle enshrined for

<sup>1</sup> Wilmot, *South Africa*, i. 238–61; Molteno, *Sir John Molteno*, ii. 300–401; *Parl. Pap.*, C. 2079, 2144; Cape Act, No. 16 of 1855; No. 5 of 1878, s. 1; No. 7 of 1878, s. 32; Attorney-General for the Cape, *Cape Parl. Pap.*, 1878; A. 4, p. 14. In New South Wales it was held by Sir W. Manning that the Act of 1867 did impose a personal duty on the Governor: Clark, *Austr. Const. Law*, pp. 263 ff.

<sup>2</sup> *Parl. Pap.*, Feb. 1866, p. 259; 1867, pp. 44 ff., 55 ff., 62 ff.; H. C. 307, 1869, pp. 2 ff., 3 ff., 19 ff., 23 ff.



all possessions of the Crown in the Colonial Regulations, which imposed on all military, naval,<sup>1</sup> and civil officers of the Crown the duty of mutual assistance in the King's service. Hence Governors can ask for aid from any Imperial forces of any kind within reach, but the decision whether to give aid or not rests with these officers and their superiors. In point of fact in modern conditions telegraphic requests from the Governor would be used to secure aid through the Imperial Government if time permitted.

The discipline of the forces provided for in the Dominion Acts was naturally on the same lines in principle as the British, but milder penalties were provided. In time of war, of course, severer rules applied, though the Commonwealth did not impose the death penalty for desertion. The colonial Acts were given by s. 177 of the *Army Act* extraterritorial effect; if the colonial Act makes no provision and colonial forces are acting with regular forces, then the Imperial Act applies. Or it might, as in the Commonwealth and New Zealand Acts of 1909, be applied by authority of these Acts. But legislation also provides for the control, by the Imperial or Dominion Governments respectively, of officers and men attached for training to the Imperial or Dominion forces.<sup>2</sup> In the Commonwealth and Canada power was given to place the local forces, if serving with Imperial forces within the territory on active service, under the control of the Imperial officer commanding, if this appeared desirable to the Governor-General in Council.

None of the Dominion Acts made any effective provision for compulsory service outside the local limits or the adjacent territory, and thus all the local forces sent to the Soudan in 1885 and the South African war<sup>3</sup> were raised voluntarily under the Imperial Army Act or local Acts, but in either case served under the *Army Act*. To provide for their legal control on the voyages to and from South Africa, and while in their own

<sup>1</sup> Hence imperial warships in Dominion waters may lend aid to prevent riots.

<sup>2</sup> *Army Act*, s. 177; 9 Edw. VII, c. 3.

<sup>3</sup> *Parl. Pap.*, Cd. 981, 1364, 1423 (as to martial law in South Africa); Cd. 18, 469; *Canada Sess. Pap.*, 1900, Nos. 20, 49 (as to forces). The idea of neutrality for the Cape (*Deb.*, 1899, p. 333) to avoid rebellion was hastily laid aside: *Cana. South Africa*, pp. 184 f., 206.

colonies, full legal authority was deficient, though no serious trouble arose, the prerogative of the Crown, even apart from statute, to raise troops being recognized in South Australia in *Napier v. Scholl*.<sup>1</sup> But to obviate future trouble, in 1909-10 court-martial warrants were issued to all the Governors-General and the Governor of New Zealand, giving power to convene and confirm general courts-martial held within the Dominion for offences against the *Army Act*, committed by persons enlisted in the Dominion under that Act, or enlisted under a local Act but serving under the *Army Act*. Further, a Governor could issue a warrant to the senior officer in charge of troops embarked in a Dominion if subject to the *Army Act*, allowing him to convene and confirm district courts-martial, which warrant would cease to have effect on reaching the destination of the troops; for the return voyage the officer commanding at the port of embarkation could issue a like warrant to the officer in charge.<sup>2</sup>

Towards the local forces the attitude of the Imperial Government was essentially advisory. For such ends the Colonial Defence Committee was created in 1885, and led up to the more important Committee of Imperial Defence which came into being in 1901 mainly as the result of Mr. Arthur Balfour's strong interest in defence matters.<sup>3</sup> The body was given a permanent secretariat in 1904, the Colonial Defence Committee falling into the rank of a sub-committee. It did now much important work nominally advisory in character, though the Dardanelles Commission, in its Report of 1917, held that it did more than advise: it decided. This of course referred merely to Imperial affairs; in Dominion questions it was purely advisory. The Canadian Minister of Militia sat on it in 1903, and in 1905-6 it developed a defence scheme for the Commonwealth. Moreover, under its aegis was developed the scheme for a territorial army and an expedi-

<sup>1</sup> 1904 S. A. L. R. 73, 88. For New South Wales see Act No. 12 of 1899; Victoria Acts, Nos. 1619, 1627, 1655, 1698. Cf. also *Williams v. Howarth*, [1905] A. C. 551; *Howarth v. Walker*, 6 S. R. (N. S. W.) 98. An Imperial Commission has, of course, *per se*, no colonial validity; cf. Cd. 2565. The Crown's prerogative is attacked by Art. 46 of the Irish Free State Constitution.

<sup>2</sup> Commonwealth Act No. 15 of 1909, s. 4; New Zealand *Parl. Pap.*, 1910, A. 2, p. 47.

<sup>3</sup> *Parl. Pap.*, Cd. 2200; Cd. 3524, pp. 15 ff.; Hansard, ser. 4, cxxxix. 68, 619; cxlvi. 62; *House of Commons Deb.*, viii. 337, 1382 ff.

tionary force which Mr. Haldane expounded to the Colonial Conference<sup>1</sup> of 1907, when he explained the purpose of the Imperial General Staff formed in September 1906 in order to think out defence problems; officers from overseas would be welcomed to serve on it and the loan of officers to overseas forces would be gladly afforded. Importance was also laid on the desirability of each part of the Empire organizing for self-defence and for the giving of assistance to the rest of the Empire if need arose, and for this purpose uniformity of organization in principle and in detail was suggested, interchange of officers and even units was mooted, and the importance of uniformity in composition of units, administrative services, arms and ammunition, and stores was stressed. There was no suggestion of any control; merely co-operation on a footing of complete Dominion autonomy, designed to make any contribution to common defence, if granted, as efficient as possible. The Conference, while insisting on autonomy, approved the principle of a General Staff, selected from the forces of the Empire as a whole, to study military science in all its branches, collect and disseminate information and intelligence, undertake the preparation of defence schemes on a common basis, and, at the request of the governments concerned, advise as to the training, education, and war organization of the forces in any part of the Dominions. It was agreed also to continue the practice of any Dominion inviting the views of the Committee of Imperial Defence, on which the Dominion might be represented for discussion of matters of interest. The General Staff scheme contemplated in each Dominion a corresponding organization on a small scale, entirely under Dominion control, but in close touch with the Imperial General Staff, to be strengthened by the appointment of Dominion officers to serve for a period in London and vice versa. The proposal went on slowly gathering strength, and was helped by the Naval and Military Conference of 1909,<sup>2</sup> at which a sub-conference of experts, meeting under the Chief of the Imperial General Staff, discussed his proposals for so organizing the forces of the Empire as to secure effective co-operation in war. The Imperial Con-

<sup>1</sup> See *Parl. Pap.*, Cd. 4948; Cd. 5335, p. 4. For the Conference discussion, Cd. 3523, pp. 94 ff.

<sup>2</sup> *Parl. Pap.*, Cd. 4948.

ference<sup>1</sup> of 1911, which was supplemented by expert discussions at the War Office, showed progress; it was agreed to assimilate promotion examinations in the Dominions and the United Kingdom, and the principle of securing courses of instruction in the United Kingdom and India and attachment to the Staff Colleges at Camberley and Quetta for Dominion officers was accepted. It was also agreed that the Dominions should be able to requisition the services of the Inspector-General of the Oversea Forces, a new office held in conjunction with the Commandership-in-Chief in the Mediterranean,<sup>2</sup> and in pursuance of this resolution Sir Ian Hamilton visited Canada in 1913 and the Commonwealth and New Zealand in 1914, presenting elaborate reports on the forces of these Dominions to their Governments for such action as they might think fit. On 1 April 1912 a Dominion section of the Imperial General Staff appeared at the War Office, to which Canada and Australia supplied officers. In June 1911 the Military College of the Commonwealth was opened at Duntroon, training thirty cadets yearly for four years, with further training in England or India, New Zealand cadets being also eligible for admission. In the same year a Railway Council for war purposes was created, and in 1912 the Council of Defence was remodelled and organization revised to assimilate it to the British model. South Africa created, in 1913, a South Africa Military College and a Council of Defence with undefined functions, the Commandant-General having wide authority.

Before the War the cadet movement, voluntary in Canada, but compulsory in Australia and New Zealand, where junior cadets received practically physical training from 12-14, senior cadets real military training from 14-18, was making great progress, and in the two latter Dominions compulsory training was being steadily introduced, while in the Union Act compulsion was proving needless, as the fifty per cent. basis of training, which alone was contemplated, was proving to be easily met by voluntary enlistments. In December 1913 the Commonwealth forces were 2,468 permanent, 45,915 active citizen forces; in 1914 in New Zealand 578 and 25,902; in 1913 in Canada, out of a nominal 74,606 of all ranks 57,527 received some training, mostly inadequate: there were 48,000 members of rifle

<sup>1</sup> *Parl. Pap.*, Cd. 5746-2, pp. 3 ff.

<sup>2</sup> *Ibid.*, Cd. 5019, 5598.

associations and 44,000 cadets, as well as a small corps of Guides, all officers, mainly civil engineers and surveyors intended for intelligence and other skilled work in case of need.

## § 2. *Dominion Co-operation in War, 1885-1919*

After the grant of responsible government little occasion arose for the co-operation of Dominion with Imperial forces in matters not immediately affecting the Dominions. In 1884, however, General Wolseley, who remembered the excellent work done by Canadians during the Red River Expedition,<sup>1</sup> which, negligible in a military sense, was a great feat of transport, asked for and obtained the services of Canadian voyageurs for a movement up the Nile in the Gordon Relief Expedition. Moreover, though they were not accepted, offers to recruit in Canada for work in Egypt were made to the Imperial Government, and the Dominion Government expressly stated that it raised no objection to this being done. It was, of course, clear in law that recruiting in any part of the Empire for the army is legal,<sup>2</sup> and cannot be prevented by any executive government—even in the Free State this would be admitted as law—but it is also clear that such recruitment should never take place in a Dominion save with the passive or active goodwill of a Dominion government; the former might be dictated by considerations of expediency, e.g. in the Union of South Africa under a Nationalist régime. New South Wales went farther, for in February 1885, after the fall of Khartoum, the Government offered its permanent force at once for service. This was accepted to the extent of an infantry battalion and an artillery battery, which were immediately available, and the little force served for six or seven weeks in Egypt. The other Colonies were equally ready to offer, and the historical character of the occasion was duly noted by Lord Derby and public opinion. It formed the prelude to the great effort of the South African war, which had been preluded in 1881, when after Majuba two thousand volunteers were offered by Australia for the War. As early as 11 July 1899 Queensland offered 250 mounted men with machine guns, and the ultimatum by President Kruger on 9 October

<sup>1</sup> Skelton, *Sir Wilfrid Laurier*, i. 191 ff.; Denison, *Soldiering in Canada*.

<sup>2</sup> *Army Act*, ss. 76, 80, 93, 94.

produced immediate offers of aid. Canada<sup>1</sup> hesitated for the moment; Sir W. Laurier doubted if the matter was not one for Parliament to decide, though on 31 July the House of Commons had expressed sympathy with the efforts of the Imperial Government to secure equal rights and liberties for British subjects in South Africa, but Sir C. Tupper, as leader of the opposition, pressed him to send troops; public opinion was strongly in favour, and on 30 October the 2nd Battalion of the Royal Canadian Regiment, 1,150 strong, embarked. Further troops were sent, both of the permanent forces and newly raised in 1900, while Australia and New Zealand showed no less eagerness; Canada supplied in all 8,400 men, including a garrison to replace the British at Halifax; Australia about 16,000, of which New South Wales sent 6,208; New Zealand 6,000; and South Africa, directly affected, 52,000. The control of these forces was Imperial throughout; the cost was divided between the two Governments, the Colonies bearing transport costs and making up the pay of their men.

The precedent set in 1899 rendered it inevitable that, when war was so obviously forced on the Imperial Government as in 1914, there should be an immediate response from the Dominions.<sup>2</sup> Canada offered at once 20,000 and immediately raised the offer to 33,000 men, and undertook the work of raising these forces, which by July 1916 amounted to four divisions, a cavalry brigade, and considerable bodies of forestry and railway men. Training was concentrated in England, where, after the resignation of Sir Sam Hughes, a Minister for Militia Overseas was stationed, the work first being carried out by Sir G. Perley, then from October 1917 by Sir E. Kemp. The supreme command of the Canadian forces, at first exercised by Imperial officers, was given, on Sir Julian Byng's promotion after the battle of Vimy in 1917, to Sir A. Currie, who had attained by merit the post of commander of a division. Promotion from the ranks soon replaced nomination for commissions. The enlistments were made, it seems, under the *Army Act*, in

<sup>1</sup> The ambiguities of the position appear clearly from Skelton, *Sir Wilfrid Laurier*, ii. 91 ff.

<sup>2</sup> Keith, *War Government of the Dominions*, pp. 75-111. These are official histories for the Dominions. For Lord de Villiers' legal doubts as to procedure in Aug.-Sept. 1914, see Walker, pp. 500 ff.

order to avoid doubts as to the validity of service overseas under the *Militia Act*, which indeed permitted service beyond the Dominion, but only for the defence of Canada, which might be held too limited to cover the expeditionary post ; as late as April 1916 the legal position <sup>1</sup> was questioned. The growth of the force into the dimensions and organization of an army corps under a Canadian officer was naturally followed by the desire of recognition of as much autonomy as possible. By Order in Council of 11 April 1918 an Overseas Military Council was created with Sir E. Kemp as head, as deputy a Chief of Staff, replacing the general officer commanding in England, Adjutant-, Quartermaster-, and Accountant-Generals. The new Council asked for wider control over the forces in France, its power in the United Kingdom being ample, and Sir R. Borden took up the matter at the Imperial War Cabinet of 1918, and a statement issued by him at Ottawa on 24 August explained that the organization of the Canadian army was to be independent of the British army except so far as the supreme command of Sir Douglas Haig and Marshal Foch was concerned. The internal management of the Canadian army was to be entirely under Canada ; for this purpose arrangements were made for the existence of a Canadian section at General Headquarters with specific authority over the various Canadian administrative services and departments in the field, and empowered to supervise the carrying out of such executive action as might be decided upon from time to time in respect to the personnel of the forces. It was also authorized to supervise the many subsidiary Canadian organizations in France and Belgium, while a Canadian Air Force was to be created to co-operate with the British Air Force, in which many Canadians had been serving under Imperial control ; but this project was left incomplete by the early termination of the War.

To maintain the forces in the field voluntary enlistment proved in the long run unsatisfactory ; <sup>2</sup> the population of alien origin was large, being put as high as 500,000 former subjects of the central powers in Europe or their descendants, and 700,000 Americans ; the French Canadians refused to

<sup>1</sup> *The Round Table*, vi. 547 ; cf. *Fournier v. Price*, R. J. Q. 60 S. C. 489.

<sup>2</sup> For a candid account, though anti-conscriptionist, see Skelton, *Sir Wilfrid Laurier*, ii. 506 ff.

volunteer, M. Bourassa denouncing the forging of 'a militarism unparalleled in any civilized country, a depraved and undisciplined soldiery, an armed rowdyism, without faith or law, and as refractory to the influence of individual honour as to that of their officers'. Men were urgently needed for agriculture, while munition orders absorbed 200,000. In May 1917 Sir R. Borden returned from the Imperial War Cabinet, convinced that conscription was necessary; the United States had come into the War and adopted the selective draft; there was less temptation to seek refuge in America from compulsion, and a treaty, which did not, however, become operative until 30 July 1918, was in preparation to secure application of compulsion to British subjects in the United States and vice versa. In Quebec 6,979 men only had enlisted, while the English-speaking population, not a quarter as numerous, had supplied 22,000 and French outside Quebec, a sixth in number of those in the province, 5,904; total enlistments were only some 400,000. The application of conscription was demanded by a strong section of Liberal opinion under Mr. Rowell, leading to the formation of the Coalition Government of 12 October 1917, while it was opposed by Sir W. Laurier on behalf of Quebec. He suggested a referendum, but this was defeated by 111 votes to 62, and the Bill became law, a proclamation to call up the first class being issued on 13 October 1917. The Act contemplated merely the raising of 100,000 men by compulsory enlistment, from age 20 to 45, the first class including those over 20 and not born before 1883. Exemptions included aliens by birth who still retained their old enemy nationality; and enemy aliens and aliens whose mother tongue was German, who had been naturalized since 1902, were by the *War Time Elections Act* disqualified for the franchise. The same Act and the *Military Voters Act* gave the vote to women connected with those of military service and to all engaged, males and females, in war work for Canada. By these changes of the franchise the Government which dissolved Parliament succeeded in winning an appeal to the people, so that serious enforcement of the Act could be contemplated. But the process of enforcement was slow, and the exceptions allowed far too numerous; occupation, educational continuity, training, health, exceptional financial or family circumstances, religious belief as regards combatant



service, were available as grounds, and the vast mass of primary tribunals (over 1,200), appeal tribunals, and the final tribunal, a Supreme Court judge, rendered it very hard to compel any really unwilling person. Efforts to raise men in Quebec led to grave rioting on 28 March, in the course of which four civilians were killed on 1 April, troops having had to be invoked to maintain order, as the Mayor failed to preserve the peace. An Order in Council of 4 April gave the Governor in Council power to supersede civil law and jurisdiction in any specified area, and to require all those within it to conform to the orders of the military commander on pain of trial and punishment by court martial. Further action was soon necessary; on 1 April the Imperial Government urged reinforcing the Canadian troops in the fullest possible manner and with the least possible delay, in harmony with the Imperial action in taking fresh steps to call out men. After a secret session on 19 April Sir R. Borden moved a resolution which was passed and embodied in an Order in Council next day. It reduced the age to 19 and cancelled all exemptions for young men between 20 and 22, thus disposing of the wholesale exemptions of farmers' sons and of youths in Quebec. The figures given were distressing proof of the refusal of French Canada to do its share; of 365,000 enlisted 172,000 had been born in the United Kingdom, 147,000 were of British descent, and only 16,000 stood for French Canada. To override the law by Orders in Council under the *War Measures Act*, 1914, was a strong measure, but it was manifestly legal. It was pronounced invalid by the Supreme Court of Alberta and by the Superior Court of Montreal, which ludicrously asserted that only the Imperial Parliament could repeal *habeas corpus*. The Government on 5 July, by Order in Council, decided that, despite these decisions, the Order of 20 April was to be obeyed; a dispute arose between the Government and the Alberta Court, the former declining to pay any attention to a writ of *habeas corpus* in respect of one *Norton*, while the Court issued a writ of attachment against the officer in whose charge the man was. The Supreme Court<sup>1</sup> of the Dominion, however, after dealing with the case of one *G. E. Grey*, decided, as was inevitable, that the Order in Council was valid. It pointed out that the terms of the *War Measures Act*, 1914 (s. 6), were ample to cover the

<sup>1</sup> Cf. *Canadian Law Times*, xxxviii. 671.

action taken, and that the *Military Service Act* expressly disclaimed any interference with the powers of the Governor in Council under the *War Measures Act*; stress was laid also on the fact that Parliament had approved the Order. Even so a Quebec judge could still be found on 6 August to refuse to follow the Supreme Court, on the plea that Canada could not repeal *habeas corpus*: small wonder that Quebec judgements rank low in the scale of intelligence. None the less it may be admitted that the Act was a fiasco;<sup>1</sup> up to the Armistice it had raised only 83,355 men, and Canada's war work was done by the 465,984 voluntary enlistments. At the Armistice the total of the army corps was only 110,600, but it was much stronger than the average British force, with its four full divisions, each containing four battalion brigades. In this regard Canada showed her autonomous position in all but essentials of employment. When it was desired by the Imperial command to convert the Canadian forces into two corps, each of three divisions, the fifth division being brought over from England, and by withdrawing a battalion from each brigade a sixth division being formed, General Currie protested so effectively that he was left with his powerful corps, a fact which accounts in part for the brilliance of its performance in the final attacks. Earlier also the wishes of Canada had prevailed against breaking up the corps and dispatching part of it to Italy, while when, after the disaster of 21 March, the corps was being broken up by its divisions being separated, General Currie was able to secure its reconsolidation with all that that entailed of *esprit de corps*. In addition to the corps, a Canadian cavalry brigade fought independently; Canadian airmen were always a part of the Imperial air arm; there were railway units and a forestry corps, making in all some 38,000 or 39,000 not under the corps commandant. Canadian garrisons held Bermuda and St. Lucia, artillery served in North Russia, an expeditionary force in Siberia, railway men in Palestine, and a few picked men in Mesopotamia with the 'Dunster force'. The total enlistments in the Canadian forces to the Armistice were given as 590,572, excluding some 15,000 British and allied reservists; 418,000 went overseas; about 51,000 were killed, and nearly 150,000 were wounded.

In Newfoundland the lack of military organization of any

<sup>1</sup> Cf. Skelton, *op. cit.*, ii. 544 ff.

kind did not prevent immediate preparations to aid ; a *Volunteer Force Act* was passed (1914, c. 4), which was annually renewed until replaced in 1918 on 11 May by an Act for compulsory service, which was to apply to all British subjects between 19 and 40 ; its passage was followed by the calling up of unmarried young men between 19 and 25 ; the Supreme Court judges were made the exemption tribunal, and exemptions were much better regulated than in Canada. Enlistment in 1914 had been for one year only ; when it expired, those serving insisted on re-enlisting, and the Royal Newfoundland Regiment began a fine career in Gallipoli, while Newfoundlanders fought with great success on the western front. In all, 6,339 were enrolled, 4,948 sent overseas, 1,232 killed, a very high figure, and 2,314 wounded. A forestry corps of 500 created in 1917 did excellent service, leaving, alas! an indelible mark on Scottish forests.

The Commonwealth, on 3 August 1914, offered the services of 20,000 men, and the offer was readily accepted, a division being asked for as well as other troops. No sooner had these been sent than further men were offered and taken, and in November 1915 50,000 more men were accepted in addition to reinforcements of 9,500 monthly. But in March 1916 these figures were declared to be needlessly high by the Defence Minister, with very bad effects on recruiting. The idea of compulsion now began to be mooted, but Labour developed a dislike to compulsion, which was not possible for service outside Australia under the express terms of the *Defence Act*. Mr. Hughes's mission to London was expected to result in a proposal for compulsion, but the Prime Minister was ill-advised ; in lieu of at once facing facts or deciding to allow the need for compulsion to be slowly appreciated in the Commonwealth, he took the fatal step of proposing a referendum to decide whether the Government should be permitted to exercise the same power of compulsion in calling up men for service abroad as for home defence. Pending the referendum, men from 21 to 45, being unmarried, were to be called up for training, so that they might be sent abroad if the referendum authorized this. The procedure was justified by the contention that the Senate would never have accepted conscription, and that to enact it by regulation under the *War Precautions Act* might have been legal but certainly not constitutional, while the Senate might

have disallowed the regulation. On the other hand, if a referendum pronounced for the plan of compulsion, the Senate might be expected to accept it. The result on 28 October was disastrous ; New South Wales, South Australia, and Queensland went against the proposal, and the total for was only 1,087,557 to 1,160,033 against. Labour was divided ; farmers voted against interference with their crops and high profits ; women preferred to keep their relatives at home in safety and prosperity ; it was alleged that Australia was doing harder fighting than England—a ludicrous allegation ; Indians were advocated as more suitable to be used in war—a plea which came strangely from Europeans who had once ridiculed the idea of sheltering themselves behind men of colour ; those who volunteered would find their places filled by cheap alien labour. The Industrial Workers of the World commenced its evil propaganda, the New South Wales Labour party expelled the Prime Minister who once was its chief ornament. Something must be granted to the malcontents ; the trick of calling up the men for training before the result of the referendum was annoyance and prejudice ; the Prime Minister quarrelled on minor points with three of his colleagues, who resigned as a protest against his securing a meeting of the Executive Council behind their back ; and, by failing to say that he would resign if the referendum failed, he gave the impression of insincerity. The defeat of the referendum led to manoeuvres by the Prime Minister which, as has been seen, resulted in the final return to office of a coalition Ministry in which the Liberals were the mainstay, strengthened by the result of an appeal to the people on 5 May 1917, but under definite pledge not to introduce conscription by its parliamentary majority. Power had been obtained at the sacrifice of principle. The Italian *débâcle* induced Sir W. Irvine <sup>1</sup> to appeal to the Ministry to risk its comfortable position in an appeal to the country by a dissolution for power to act, but this high courage was not shared by Mr. Hughes. He resolved to try another referendum under the *War Precautions Act*, 1914-16. The proposal submitted was reduced almost to ludicrous simplicity ; voluntary recruitment was to go on, balloting being used to make the numbers up to 7,000 a month ; those liable were only to be unmarried men, widowers without

<sup>1</sup> Cf. *Parl. Deb.*, 25 Jan. 1918, p. 3555.

dependents, or divorcees from 20 to 44; there was a long list of possible exemptions; sacrifice was to be made equal as between families. There were excluded from the vote naturalized British subjects born in enemy countries and their children. The proposal was very decisively beaten by 1,181,747 to 1,015,159; Victoria this time went against, thanks to the efforts of the Roman Catholic Archbishop Mannix, who, as a vehement supporter of Sinn Fein, hated the English. The Prime Minister had a violent dispute with the Queensland Premier on the issue of the censorship; the latter evaded it by publishing in *Hansard* a mass of secret matter; the Commonwealth seized the stock of *Hansard*; there were begun prosecutions of the Premier by the Commonwealth, and a suit against the Commonwealth by the State, both of which happily were dropped. Curiously enough, the soldiers overseas who voted approved conscription only by a small majority, while the women's vote was cast definitively against conscription. Mr. Hughes had pledged himself at Bendigo on 12 November to resign if defeated at the referendum. He did so, but only to return to office, with the approval of the Governor-General, but amid Labour denunciations that he had belied his pledge and had postponed public interest to personal gain.<sup>1</sup> The Governor-General at his advice convened on 12 April at Melbourne a great conference of politicians, employers, Trade Unionists, and others. But the only fruit was a colourless resolution to seek to obtain reinforcements to the number of 5,400 monthly, as held adequate by the Chief Justice, by voluntary effort, and no effort was made to live up to this by Labour, while in return Mr. Hughes had definitely pledged himself not to seek conscription. The cowardice of the Government, and the trick by which it kept office, deprived it of any moral authority, and the State Labour party of New South Wales pronounced in favour of peace in June, to be followed by the Inter-State Labour Conference at Perth later in the month. This body was dominated by dislike of the war, which it attributed to commercial rivalry, territorial ambitions, and dynastic considerations. It deplored the failure to obtain

<sup>1</sup> The Governor-General no doubt was right in acting on advice, but Mr. Hughes's advice met its just retribution in his utter fall in 1921-2. For his defence, see *Deb.*, 1918, p. 2942.

peace, admitted that it was not prepared to fight until victory was secured, urged the imitation of the Russian revolution, and the opening of a peace conference. Further co-operation in recruiting was declined, unless the Allies at once agreed to peace without annexations or indemnities, and even so priority was to be given to the defence of Australia—which was in no danger from any one except Labour revolutionaries, who boasted that they would have rebelled in 1917 if conscription had been carried. A new military policy was enunciated, abolishing all compulsion below the age of 21; distinctions between commissioned and non-commissioned officers, oaths, salutes, and needless discipline; and requiring that men on being trained should be allowed to keep their arms. Labour ceased now to take part in recruiting, and nothing save the close of the war prevented Australia from having to confess that she could not continue to play her part and must fall behind the other Dominions. It is regrettably true that disloyalty and hostility to the Empire appeared far more clearly and in a much more dangerous form in the Commonwealth than in any other part of the Empire.

The services of the actual forces, on the other hand, were of special merit; the defects of the Australians were want of discipline, partly induced by their lack of severe penalties, which somewhat complicated the task of keeping order among them; their energy and initiative, on the other hand, were most praiseworthy. Moreover, the fortitude shown by the troops and people in the matter of the failure at Gallipoli was worthy of every praise. Australians not merely served with great success on the western front, but they supplied an air squadron for Mesopotamia, some men for the 'Dunster force', won fame at Sinai and in Palestine, and at the beginning of the war seized German New Guinea, which was retained under mandate under the terms of peace. Total enlistments amounted to 416,809, 332,000 went overseas, 59,000 were killed or died, and the total casualties exceeded 318,000. No doubt the fact that the force was volunteer explains the very high rate of losses, but there was unquestionably a needless strain placed on the troops towards the end for want of reinforcements. The men enlisted were taken under the *Defence Act*, which applied to them overseas the *Army Act* subject to certain changes,

especially as regards penalties, including the abolition of capital punishment for desertion.

New Zealand commenced with an offer of 8,000 men, to whom had shortly to be added Maoris, whose services could not be refused when those of Indians were accepted.<sup>1</sup> At first recruits were numerous enough easily to supply the 1,800 every two months needed as reinforcements, but when, at the close of 1915, the number had to be raised to 2,500 this system failed to be adequate and public opinion demanded<sup>2</sup> conscription. In May 1916 this was proposed, and carried by August without serious resistance; the Act classes members of the Expeditionary Force Reserve in two bodies, the first including unmarried men, divorcees, or widowers without children under 15, the rest all other males between 20 and 46. Voluntary recruiting was to go on until stopped, and the ballot was to be used to call up sufficient men to make up the numbers requisite. Ballots did not begin until November 1916, and voluntary recruitment for the first division continued to 23 June 1917. Many exemptions were granted and in August 1917 the quota of reinforcements was reduced to 1,920 on pressure from New Zealand. But the disasters of March 1918 produced a sterner spirit; on 15 April it was announced that 1,700 men more a month would be sent in April, May, and June, and the ballot applied to married men with one child, while voluntary recruiting was opened for married men with two or three children. Many first division cases were also reopened, the married men insisting that unmarried men should be called up first. Some difficulties were experienced; the miners by a strike evaded conscription, but this was no hardship on economic grounds, and a member of the Lower House who refused to serve was sentenced to two years' imprisonment, thus vacating his seat.

New Zealanders occupied Samoa at the outset of the war; they fought in Egypt, Gallipoli, the Sinai Peninsula, and Palestine, as well as on the western front; 117,175 out of a total population of 1,100,000 men enlisted; 100,444 went over-

<sup>1</sup> Act No. 44 of 1915 made provision for legal control of the expeditionary force when on active service under the terms of the *Army Act*. It was amended by No. 9 of 1918.

<sup>2</sup> Act No. 8 of 1916. The reserve thus created was abolished by proclamation of 13 Aug. 1919 under Act No. 9 of 1918, s. 6.

seas ; there were about 17,000 deaths and 58,000 total casualties. The proportional strain was much greater than in the case of Canada or even of Australia, and at the close the New Zealand force was in excellent strength and heart.

In the case of the Union of South Africa immediate aid was accorded to the Imperial Government by the Union undertaking the duties hitherto performed by the Imperial forces in South Africa, only a few units being left there. Then the energies of the Government were absorbed in the work of invading German South-West Africa,<sup>1</sup> which was hindered by the serious rebellion which called forth all the resources and ability of Generals Botha and Smuts. When these episodes had been cleared away, the Union Government gladly assisted in recruiting forces which were to be paid for by the Imperial Government. Later in 1915 it sent men on request to East and Central Africa for service against the Germans, later paying part of the cost. In January 1916 it permitted General Smuts to undertake his successful campaign to dispose of the Germans in East Africa, which was complete by the end of 1916. Useful work was done in Egypt and Palestine by the South African Field Artillery and the Cape corps of coloured men. The necessary reinforcements were sent regularly to keep up the Expeditionary Force on the western front, which from 1 January 1917 was paid at Union rates by the Imperial Government, the Union giving a grant of £1,000,000 in discharge of its obligation, a concession to Nationalist feeling. 30,719 troops served in Europe or Egypt, as well as 1,925 coloured labour unit and 25,111 native labour contingents ; 43,477 in East and Central Africa with 16,845 labourers ; 67,237 in South-West Africa and 33,546 labourers. Casualties totalled 18,528 with 6,592 deaths. The Expeditionary Forces served under the *Army Act*.

The contributions of the Dominions were large and important, but relatively to the United Kingdom they were small. One calculation indicates that the percentage of men who served in the forces was in the United Kingdom, less Ireland, 27·28, with 10·91 per cent. of the male population casualties ; in Canada the figures were 13·48 and 6·04 ; in Australia 13·43 and 8·50 ; in New Zealand 19·35 and 9·80 ; and in South Africa 11·12 and 2·7, of white male population. The figures, moreover, are unjust

<sup>1</sup> Keith, *War Government of the Dominions*, pp. 112 ff.



to the United Kingdom, as the population there contained a larger proportion of old and unfit men, and more men were necessarily engaged in munitions work, which made considerable claims also on Canadian man-power, but less in the other Dominions. The superior physique of the picked volunteers of the Dominions was seen in the proportion of casualties to the men sent overseas ; in the United Kingdom, which supplied large bodies of low-grade troops for service in the rear areas, the figure was 43 per cent. ; for Canada with its considerable numbers of technical troops, 44·88 ; for New Zealand 50·70 ; and for the dashing Australians 63·36. There can be no doubt of the special value of these fine energetic troops. Moreover, the efforts to secure uniformity had not been without effect, once the Canadians got rid of the ' Ross ' rifle, which proved inferior to expectation. On the other hand, the independence of General Currie enabled him to exercise what he held to be useful influence in securing the wise use of his troops, while Sir E. Kemp laid stress on his efforts to secure that the Canadian forces should be kept together, in the course of which he addressed both Sir D. Haig and Marshal Foch.

### § 3. *Military and Air Defence since the War*

The conclusion of the war necessarily led in the Dominions to the expectation that a time of reduced expenditure on defence was secured, and in Canada the tendency to object to any expense on the armed forces of the Crown soon became marked. A proposal to increase the permanent force to 10,000 men from 5,000, was accepted by the Government but never carried out, even when Sir R. Borden and Mr. Meighen were in power, and after the Liberal accession to office in 1922 the process of decrease in expenditure has been on the whole steady. The system remains as before the war—that is, in principle an active Militia, comprising a small permanent force, on a basis of three years' service, with the annual training of a certain number of non-permanent Militia ; thus, in reporting in 1924, the Minister of National Defence, whose office was created in 1922 <sup>1</sup> to take over the functions of the three departments of military, air, and naval defence, admitted that only 38,000 men had been

<sup>1</sup> *National Defence Act, 1922 (c. 34).*

trained<sup>1</sup> at local head-quarters and camps, while officers were disgusted with the duty of training skeleton formations and interest was waning. The total establishment called for 133,000 all ranks, but the available sums were quite inadequate for any extension of training, the cost per head of population being 1.46 dollars. The cadet movement showed over 110,000 cadets, despite the reduction in the grant. The Militia is both for service in or outside Canada for the defence of the Dominion. All British subjects between 18 and 60 are bound to serve in the event of a *levée en masse*. A reserve Militia is specifically enlisted, and there are military and civilian rifle associations.

The administration under the Minister is directed by a Defence Council which began to function on 31 January 1924.<sup>2</sup> The Royal Military College at Kingston, which is to provide for 300 cadets, remains one of the most valuable assets of the country as a training centre for officers. Eight Imperial commissions a year are awarded to its graduates. There are eleven military districts; organization is on a brigade basis with ultimate aim at divisional organization. The units of the Expeditionary Force have been incorporated into the Militia with a view to preserve their traditions and *esprit de corps*.

In the Commonwealth the effect of the war and of the Washington Conference was to reduce the desire to enforce fully the system of compulsory training, especially as the Labour party, by which the principle was at first earnestly supported, had changed entirely its views and decided to make a plank of their platform the abolition of compulsion. The existing organization is territorial, and includes the permanent forces and the citizen forces; two cavalry divisions; four divisions; three mixed brigades; fixed defence troops (coast artillery and engineers) and non-divisional troops. Each division produces a battalion of infantry and a proportion of other troops. There is no compulsion save for home defence, and in war the

<sup>1</sup> The maximum period is thirty days; actually in 1924-5 it was nine, and this is usual.

<sup>2</sup> It comprises the Minister, the Deputy Minister, the Chief of Staff, the Director of the Naval Service, and the Comptroller (Finance Member), and as Associate Members the Adjutant-General, the Quartermaster-General, the Director, Royal Canadian Air Force, and a Secretary. The Air Force is administered under the Chief of Staff. In war time and under exercise the Militia falls under the *Army Act* rules of discipline.

*Army Act* with modifications applies. The training of junior cadets, boys aged 12 and 13, was recommenced on 1 July 1924 ; it is conducted by educational authorities, and is physical for ninety hours yearly ; other training, it was decided in 1922, should be restricted to the more populous centres and to certain quotas only ; thus from 1 July 1924 senior cadet training was reduced to one quota in lieu of four, training for sixty-four hours, beginning on 1 July of the year in which the cadet reached the age of 17 ; citizen force training—four days at home, eight in camp—is confined to three quotas in lieu of seven, extending from the age of 18 on 1 July to the age of 21 on 30 June. But there remains the liability both to register at 14 and to serve the full period if called upon to do so. It will be seen that voters are thus freed from compulsion. Thus in 1925 the total training strength was 38,889, of whom 1,697 were permanent forces, and in 1926 only 45,273. The Royal Military College at Duntroon continues to function with twenty-one annual vacancies, and the Railway Council was established in 1911 to control an Engineer and Railway Staff Corps. Rifle clubs were handed over to civil control in 1921.

The Australian Air Force was originally constituted as a branch of the military forces of the Commonwealth ; it now ranks as an autonomous unit under legislation of 1923. It is administered by a Board of two Air Force Members and a Finance Member, and includes, besides a head-quarters staff with representation at the Air Ministry in London, a Flying Training School, an Experimental Section, and a squadron and a flight of aeroplanes. In matters of policy the Minister of Defence is advised by an Air Council, including naval, military, and air officers, and the Controller of Civil Aviation. General defence policy falls to the Council of Defence, composed of the Prime Minister, the Treasurer, the Minister of Defence, three naval representatives, the Inspector-General of the Military Forces, and three other military members. The executive functions of administration and command are vested in a Military Board, under the Minister of Defence. There is an Australian section of the Imperial General Staff.

The New Zealand forces comprise a small permanent force, including Staff Corps, Air Force, Artillery, Ordnance, Army Pay, and Army Service Corps ; the Territorial Force, and the

Senior Cadets. There are three commands, two in the northern island, one in the south ; each includes four military districts with a like organization ; the plan of mobilization gives a complete division, and three mounted brigades, and supplies machinery to duplicate the force and keep it up to strength. The force numbers some 600 officers and 15,000 men ; training is compulsory, if enforced,<sup>1</sup> from the age of 18 to 25, while from 14 to 18 training may be enforced in the Senior Cadets, the training being mainly physical ; the force includes over 400 officers and 25,000 cadets. New Zealand retains the policy of administration through a general officer commanding in lieu of a Council of Defence under a minister as in Australia. Compulsory service is exigible from all males between 17 and 55 in case of emergency as opposed to 18 and 60 in the case of the Commonwealth and Canada. In New Zealand as in the Commonwealth the obligation to service is local, while in Canada it applies outside the Dominion for the defence of Canada. In the case of active service the *Army Act* applies generally, with such variations as may be prescribed in the local Acts.

In the Union a decided change resulted from the war. The Imperial Government accepted the suggestion of the Union Government that the Imperial military forces should finally be withdrawn, the Union accepting liability for coast defence. Accordingly, the Imperial property was handed over to be administered under the *Defence Endowment Property and Accounts Act*, No. 33 of 1922, and on 1 December 1921 the Imperial military command in South Africa was formally abolished. The system remains in principle as under the *Defence Act*, No. 13 of 1912. Every citizen of European descent is liable to render between his seventeenth and sixtieth year, both included, service in time of war in defence of the country in any part of South Africa within or without the Union. Moreover, if of sound physique he is liable to four years' training between his seventeenth and twenty-fifth year ; a minimum of 50 per cent. of those required to serve is enrolled yearly ; <sup>2</sup>

<sup>1</sup> It at present is enforced only up to the age of 21 and for those living within access of a training centre. Others form the reserve up to the age of 30. Rifle clubs are aided by ammunition grants but are not controlled.

<sup>2</sup> See the amending Act No. 22 of 1922 ; s. 6 allows in four years three periods of continuous training, the first not over fifty, the next two not over thirty days in all.

others on attaining 21 must enrol as members of rifle associations for four years or serve in the South African Division of the Royal Naval Volunteer Reserve. The liability of non-Europeans is left for determination by Parliament from time to time. Experience in the East African war convinced General Smuts that military training of natives offered the utmost danger to white domination in the Union. Boys between 13 and 17 in parts of the Union where proper training can be provided are required to be trained as cadets, but their parents may object. Satisfactory training for three years gives a right to diminution of Citizen Force training. The organization includes a small permanent force, including the various technical branches; the South African Garrison Artillery and Coast Defence Corps; the Citizen Force classed as (i) Active, including men up to 25; (ii) Reserve, including (a) men who have been trained in the Garrison Artillery or Active Force and are under 45, and (b) members or past members of Defence Rifle Associations; and (iii) the National Reserve, consisting of all between 17 and 60 not otherwise included; Rifle Associations, open to all liable to service in time of war; and an Air Force. The latter is administered by the Air Service Section of Defence Head-quarters. Registration for training was in abeyance during the war and was only resumed in 1924.

On 2 July 1925 a very candid admission as to South African defence was made by the Minister of Defence. He insisted that if the plan of 1912 were acted on, the cost would approach two millions, which was far beyond the means of the Union. Granted that hostile war vessels might be able to send out bombing squadrons against the capital and the arsenals, that would mean the defeat of the Imperial Navy on which in fact the Union relied for her safety, though he confessed with regret that the Union, which had diverted since 1921 its former contribution to that navy to local naval defence, was unable even to consider providing a cruiser of its own. He outlined a policy which means a distinct diminution of expenditure on defence, though he insisted that the cadets would be better trained by their own teachers as opposed to professionals, and he held out prospects of diminishing the number of the town-trainees and increasing the number in the country districts, at least to the extent of further encouragement of Defence Rifle Associations

so as to afford 8,000 country youths training. General Smuts, on 18 February 1926, uttered a jeremiad over the bad results of the change, insisting that the country youths were losing the opportunity of discipline and training which would make them valuable in emergency, while adoption of the Swiss method of training was advocated by another speaker.

The purposes of the Union Government were further explained on 26 April 1926 by Mr. Creswell, on the defence estimate of only £895,312, who insisted on the limited need of defence for the Union and the general trend of national policy towards reduction of armaments. He deprecated any effort to carry out the policy of 1912, announced that the permanent force would be reduced to three batteries of artillery, the two squadrons of mounted rifles being dispensed with; in lieu of twelve military districts six military commandos would be set up, and forty selected areas would be given a training squadron of 200 youths, who would for four years receive compulsorily a certain amount of training. It was made clear that the desire was to secure for the youth of the Transvaal, the Orange Free State, and the rural districts of the Cape—Dutch strongholds—training which hitherto had been given chiefly in urban areas and the rural areas of Natal in connexion with the Natal mounted regiments. The Government aimed at having an air force which could strike at any enemy gathering within the Union within twelve hours, and at being able to mobilize a striking force of 10,000 men in seventy-two or ninety-six hours, with a further 15,000 in readiness in a few days. In the debate stress was laid by General Smuts on the absence of trained instructors for the youth and even the cadets of the Union, and a Nationalist member, Mr. Pienaar, called attention to the pitiful inadequacy of the steps taken, alluding also to the inability of the Union on such a basis to play its due part in the defence of the British Commonwealth of Nations. The Minister, no less than his critics, admitted that the Union was wholly deficient in effective naval defence, was, therefore, entirely dependent on British protection,<sup>1</sup> and ought to take a greater part in the burden of self-protection, but the Minister insisted that funds were not available.

<sup>1</sup> Nothing was said on the compatibility of this state of affairs and General Hertzog's demand for national status.

South Africa has no elaborate system of a Defence Council. The permanent head of the Department of Defence is the Chief of the General Staff and Secretary for Defence, who also exercises the functions of Executive Chief of the Union Defence Forces and Cadets, including the Naval Force. There is a Council of Defence consisting of four non-departmental members, but its functions are merely advisory to the Minister. The sections of Defence Head-quarters are the Chief of the General Staff, Adjutant-General, Quartermaster-General, Director of Air Services, Director of Medical Services, and Financial Under-Secretary. The Union Military Discipline Code, under the *Defence Act*, is based on the *Army Act* and Rules of Procedure, and is always applicable to the permanent force, and to the other branches of the forces when employed on military service with certain restrictions on punishments when not on active service. Civil Courts have jurisdiction over purely military offences, as well as usual over those offences which are also criminal in general.

Southern Rhodesia possesses a Volunteer Force,<sup>1</sup> in eight district<sup>2</sup> commands, with a strength of 3,000. It is under the control of the Commissioner of Police, who commands also the British South Africa Police,<sup>3</sup> a force which may be called out for active service by the Governor either within or without the colony, while the Volunteer Force can be called out only for service in the different districts. The police do not in any case fall under the *Army Act*, but the Volunteer Force does if serving with Imperial troops.

The forces of Malta include the Royal Malta Artillery, which is a regular corps of the British Army and is liable for service outside Malta ; the Royal Engineers (Militia) Malta Division, which is not liable for service outside the territory ; and the King's Own Malta Regiment, which is constituted under the Malta Regiment Ordinance, 1923, and which is liable for service outside Malta, the *Army Act* applying to the personnel when embodied.

Newfoundland has now no military forces ; St. John's Rifle Club, which came into being in 1874, is not subsidized by the

<sup>1</sup> Ordinance No. 2 of 1902 ; No. 13 of 1905. See App. C.

<sup>2</sup> Ordinance No. 10 of 1919 ; No. 1 of 1920.

<sup>3</sup> Ordinance No. 21 of 1903 as amended to Act No. 7 of 1924.

Government and does no military training; the four Cadet Corps equally eschew it. The Newfoundland Constabulary, constituted under c. 24 of the *Consolidated Statutes*, 1892, is semi-military in training, but is not liable for active service.

In the case of the Irish Free State<sup>1</sup> there had existed illegally but effectively from 1916 the forces known as Irish Volunteers, the Irish Citizen Army, 1916, and the Irish Republican Army, or 'the Army' *par excellence*. To regularize the position of these forces was desirable, though the Courts found it possible to hold that after the Treaty of 1921 they became legitimate forces of the Crown. By Act No. 30 of 1923, which, though temporary in duration, has in effect been extended by later legislation, the existing army was converted into the Defence Forces, even though the members had not been recruited and attested in the manner prescribed in the Act. Part I of the Act deals with establishment, organization, administration, appointments, and conditions of service, military education, service in time of war, and special powers in relation to the defence of the State and the maintenance of barracks. Part II deals with discipline, including the constitution and procedure of courts martial, and the confirmation of sentences, and prisons and detention barracks. It further regulates recruiting, billeting, and impressment. Part III covers the establishment, training, and discipline of the reserve, and provides for calling it out in case of national emergency or in aid of the civil power. In its legislation the Parliament is bound by Article 8 of the Treaty of 1921, under which the Irish Free State establishments shall not exceed in size such proportion of the military establishments maintained in Great Britain as that which the population of Ireland bears to the population of Great Britain. It will be seen that there is a serious ambiguity due to the dishonest effort to treat Ireland as a unit; under the exact terms, it is open to the Free State to argue that the whole population of Ireland is to be set off against that of Great Britain, ignoring the defection of Northern Ireland.

The *Ministers and Secretaries Act*, 1924, creates a Council of Defence which, however, in no wise derogates from the responsibility of the Minister. He presides as Chairman, and there are four members, a civil member, chosen from the Chamber of

<sup>1</sup> See *Journ. Comp. Leg.*, viii, pt. ii, pp. 30 ff.



Deputies as Parliamentary Secretary, and three military members, the Chief of Staff, Adjutant-General, and Quartermaster-General. The military members hold office at the pleasure of the Executive Council, acting on the recommendation of the Minister, but the maximum period of office is three years consecutively. There must be at least one meeting every six months, and the Council is collectively responsible to the Minister.

The purpose of the force was explained by the Minister for Defence on 6 May 1926 as follows :

The army must be an independent national force, so organized, trained, and equipped as to render it capable, should the necessity arise, of assuming responsibility for the defence of the territory of the Saorstát against invasion or internal disruptive agencies or against violation of neutrality on the part of an enemy.

The organization must permit of rapid expansion to the maximum strength of the country's man power, and this policy involved the training of all ranks in duties superior to those normally expected of them. The estimates for the year had been fixed at £1,625,000<sup>1</sup> for 1,064 officers and 12,500 non-commissioned officers and men, and a small Air Force was provided for, while a reserve had been created of fully trained men of exemplary character, who would undergo twenty-one days' training each year. The debate showed a full realization by the Farmers' Party that the defence of the country against external aggression must rest with the British forces, and there was agreement between the opposition parties that the army was too large for purposes of internal defence and quite inadequate for serious external defence. The Government insisted that it was thanks to the army that it was possible to preserve order by an unarmed Civil Guard.

#### § 4. *Dominion Status in War Time*

Article 49 of the Constitution of the Free State expressly provides that 'save in the case of actual invasion the Irish Free State shall not be committed to active participation in

<sup>1</sup> In 1922-3 the cost was about £7,000,000; in 1923-4, £10,700,000; in 1924-5, £4,000,000, of which £1,000,000 was saved. The maximum force was 55,000.

any war without the assent of the Oireachtas' (i. e., Parliament). There is nothing revolutionary in the enactment, which has always represented Dominion practice. It will be remembered that in the Boer War Sir W. Laurier was not prepared to take any step beyond allowing volunteers to be raised for service in the British Army without the assent of the legislature, and obviously the necessity of securing funds alone would render recourse to the legislature essential at a very early date. The Irish provision, accordingly, merely turns into a part of the constitution a convention already existing. It would not prevent a ministry which approved a war making ready to give active aid during the few days before the legislature could be summoned, though, if a general election were on, the Government might be hampered in its action. The doctrine enunciated was acted on earlier by Mr. Mackenzie King when he refused, on 18 September 1922, to commit Canada to any active aid to the United Kingdom against Turkey without consulting Parliament,<sup>1</sup> and on 1 March 1923 he expressed his concurrence in the applicability to the Dominion of the Irish rule. On 26 March 1923 a formal motion to the effect that, save in the case of actual invasion, the Dominion should not be committed to participate in any war without the assent of Parliament was brought forward by Mr. Power, though too late for serious debate.<sup>2</sup> Mr. Meighen dissented from the mode of procedure and the substance of the motion alike, but on 16 November 1925<sup>3</sup> yielded to the pressure of political expediency and in a speech at Hamilton committed himself to the very difficult doctrine that Canada should dispatch no troops abroad until after a general election fought on the issue. This proposal was meant as a recantation of his part in securing the active participation of Canada in the war of 1914-18 and in special of his responsibility for the decision to adopt conscription and the tactics which won the election of 1917. It will be seen that it involves much more than the doctrine of the Irish Free State, and strictly speaking might be interpreted as suggesting that Parliament should forthwith be dissolved by

<sup>1</sup> *Canadian Annual Review*, 1922, p. 180.

<sup>2</sup> For a criticism by W. D. McPherson, K.C., see *ibid.*, pp. 1000 f.

<sup>3</sup> Keith, *J. C. L.* viii. 125 f. The doctrine was formally reiterated at Montreal on 4 June 1926.

any Government in power without even asking its views as to the wisdom of dispatching troops overseas. It must be noted that, had this fatal doctrine been applied in 1914, the Canadian forces could not have been dispatched to Europe for months after they actually had sailed, and very possibly, in the heat of a general election, the needs of the Empire might have been overwhelmed by local considerations. It is not surprising that Mr. Meighen's own supporters in Ontario noted with some perturbation the surrender of principle made by their leader in his feverish anxiety to secure office, which in July 1926 was to lead to his participation in responsibility for the refusal of a dissolution to Mr. Mackenzie King at the price of the status of the Dominion. But in any case resolutions of a Parliament have no binding force, and it may safely be presumed that, if a suitable case arose, a Canadian Government with the assent of Parliament might well send troops overseas without consulting the electorate. All depends on the popular feeling of the time ; in national crises a nation neither can nor should be fettered by pedantic doctrines if the will of the people is clear. It is equally obvious that, where opinion is divided, it is rash of a Government to risk the disapproval of the people merely because it has a majority in the Commons.

In Canada, as in the Free State, no effort has ever been made to assert that a state of neutrality is at present possible under international law, when the United Kingdom is at war, but in the Free State the idea has been revived of the possibility of foreign states in due course according recognition of the facultative neutrality of the Dominions. The idea is, of course, subject to the objection that such a neutrality is not a very attractive offer to any foreign state, which would inevitably conclude that the Dominions would be likely to be neutral when that course was advantageous to them and the United Kingdom, and to be belligerents when war might bring some advantage, and the whole idea at present at least seems to be fantastic. There is even in the Free State some sense of the utter confusion involved, to judge from the remarks of the Minister for External Affairs on 3 June 1926 when he asserted with a good deal of exaggeration that public opinion in the Dominions was tending very largely towards the assertion of a position under which the Dominions would not be

technically or legally at war by reason of Great Britain being at war.

I think (he prophesied) the whole trend of things will tend to make that opinion a fact. How far as a fact it will have any reality in the case of war it is very hard to say. It would be a valuable thing to have it established that the Free State would not be even technically at war, but from the point of view of utility the position of the Falkland Islands would be much more effective. I can only say that the general growth of opinion is towards the point . . . that it would be possible for Great Britain to be at war and other Dominions not to be even technically at war, but I do not think that is a thing that so far can be laid down as an actual definition.

This muddle-headed reasoning is tedious ;<sup>1</sup> the Dominions can become independent states by recognition by other powers, and they will then cease to be engaged in war when Britain is at war, but, as long as the term 'Dominions' is applicable to them, they will be, whether they like it or not, technically at war whenever Britain is at war, and no growth of Dominion opinion will alter the fact.

#### § 5. *Naval Defence up to 1914*

The decision of the House of Commons of 1862 to call upon the colonies to exercise some measure of self-help did not contemplate the relaxation of the responsibility of the Royal Navy for the defence of the British possessions from oversea attack, and, as a result, as late as 1910 Canada, Newfoundland, New Zealand, and the Union of South Africa were wholly without naval defence, other than such protection as might be afforded by revenue vessels or fishery protection ships.<sup>2</sup> In Australia there was more action, because there was more obvious liability to attack, and in 1865 the legal position was cleared up by imperial legislation. It was admitted that under their general

<sup>1</sup> Gen. Smuts has been careless in his expressions : 'If a war is to affect them [the Dominions] they will have to declare it. If peace is to be made in respect of them they will have to sign it. Their independence has been achieved' (Allin, *Michigan Law Rev.*, xxiv. 273) is capable of misinterpretation, but he certainly did not mean to be taken literally, though Egerton (*Brit. Col. Policy in the XXth Century*, pp. 76, 168) as well as Allin find his words perplexing. Rhetoric in Premiers is dangerous. See also p. 917, n. 2.

<sup>2</sup> Canada has upheld the right of hot pursuit ; *The Ship North v. The King*, 37 S. C. R. 385. Cf. New Brunswick Act, 1886, c. 2.

legislative power the colonies could provide for naval forces which would be entirely subject to their control, but two points of difficulty arose. In the first place, how far could the colonial legislation bind the ships and men if they passed beyond territorial limits? Secondly, how could the ships and men be brought under control of the Admiralty in time of war? Clearly, as the Imperial Government controlled the declaration of war and its conduct, the colonial vessels to be effectively used must fall under Admiralty jurisdiction. The Act of 1865,<sup>1</sup> therefore, without impairing colonial powers otherwise existing, authorized (s. 3) the maintenance of vessels of war; the control of seamen serving on them; the raising of volunteers bound to serve in emergency in the Royal Navy, and, if required, on these colonial ships; the appointment, or obtaining from the Admiralty, of officers to command such ships and men; the regulation of their conduct; and the imposition on them even beyond the colony of the regulations affecting the Royal Navy—not colonial regulations—in the case of employment outside the colonial limits. Volunteers so raised were to form part of the Royal Naval Reserve. Further (s. 6) the Crown in Council might authorize the Admiralty to accept from a colony an offer of vessels and men, which would then be incorporated in the Royal Navy and subject to all its regulations. Similarly (s. 7) the Admiralty might accept the services of the naval volunteers, who would then become subject to the same regulations as those prescribed by the Imperial Act of 1859 for members of the United Kingdom Royal Naval Reserve. This Act was amended by 9 Edw. VII, c. 19, so as to add the alternative of treating the volunteers as members of the Royal Naval Volunteer Reserve under the Imperial *Naval Forces Act*, 1903. It was provided in the Queen's Regulations for the Navy that vessels raised under the Act of 1865 should wear the Blue Ensign with the badge of the colony in the fly, and the blue pendant, the latter being the characteristic mark of a war vessel, and foreign powers were duly notified that vessels wearing these colours must be regarded as entitled to the full status of vessels of war.

<sup>1</sup> 27 & 28 Vict. c. 14. The Imperial Navy is governed by the *Naval Discipline Act*, 1866 (29 & 30 Vict. c. 109), and its amendments, 47 & 48 Vict. c. 39; 9 Edw. VII, c. 41; 5 & 6 Geo. V, cc. 30, 73; 7 & 8 Geo. V, c. 34.

The status of such vessels was further investigated in 1884.<sup>1</sup> Victoria had passed Acts Nos. 389 and 414 duly approved by the Crown in Council, as required in the Act of 1865, under which vessels commissioned by the Governor were subject to the regulations for the Royal Navy. Having had constructed in the United Kingdom two gunboats, she applied in 1884 for an Order in Council under s. 6 of the Act putting them for the period of the voyage to Melbourne in the position of vessels of the British navy. It was ruled by the law officers that an Order in Council under s. 6 could not be issued until one under s. 3 had been made ; the latter step was held justified by the issue of the Governor's commission to the gunboats under the Victorian Acts ; Orders of 4 March, therefore, accepted the vessels, and placed them at the disposal of the Admiralty. It was, however, found to be inadvisable to accept the boats for service in the Red Sea, as the liability of the crew for such service was dubious, and the use of the white ensign, as was normal for vessels of the Royal Navy, was negatived on the ground of inconvenience in relations with other units of the navy ; the gunboats then went out under the blue ensign and pendant. It was, however, agreed that as regards vessels raised for local defence within territorial limits the use of the blue ensign and pendant should also be sanctioned. It is clear that the Imperial view was that only under the Act of 1865 could colonial naval vessels have a legal status outside the colonial limits.

In addition to the two Victorian gunboats Orders in Council of 30 December 1884 and 24 January 1885 were issued under s. 3 to approve the maintenance of the heavily armed small cruiser *Protector* by the South Australian Government under Act No. 307 of 1884, and of the Queensland gunboat *Gayundah* under Act No. 27 of 1884. In 1900, under ss. 6 and 7 of the Act, a gunboat, its crew, and volunteers, were accepted by Order in Council of 7 August for service in China. But as a rule the Colonies relied on their local legislation. Not much was done ; the large expanse of Port Phillip and Hobson's Bay open to enemy cruisers led Victoria to provide herself with a force, which in 1885 at its strongest included a wooden frigate,

<sup>1</sup> *Parl. Pap.*, H. C. 125, 1884-5. Only four of the vessels in use in 1910 were covered by Orders in Council, and ten not.

one ironclad, two gunboats, and three torpedo-boats, to which in 1892 a new torpedo-boat was added. But retrenchment began in 1892 and at confederation only £19,000 a year was being spent. In New South Wales a naval brigade, the corvette *Wolverine*, and in 1885 two gunboats, represented all that was done, the presence of the naval head-quarters discouraging apprehension. Queensland started in 1884 with two gunboats, one of which, the *Gayundah*, was kept in full commission, and a naval brigade organized until 1893, when the gunboat was placed out of commission, but in 1899 activity was recommenced. South Australia procured in 1884 the *Protector* but laid it up in 1893. Tasmania once had a torpedo-boat but handed it over to South Australia, and Western Australia remained content to rely on the British fleet.<sup>1</sup>

The obvious unfairness of the burden of naval defence on the Empire being borne by the Imperial Government, and the desire of Australia to have a larger defence force than the Admiralty deemed requisite on naval grounds, resulted at the Conference of 1887<sup>2</sup> in an agreement under which five fast cruisers and two torpedo-gunboats were to be placed on the Australian station for the defence of commerce, not to be employed beyond those limits without colonial consent. Australia was to find not over £126,000 a year. Imperial and Colonial Acts ratified the agreement, the Imperial Government also receiving authority for further expenditure on coaling stations. In 1897<sup>3</sup> the arrangement was continued after the Admiralty at the Conference had insisted on the importance of being given a free hand in arranging for Australian defence, and the Cape offered the cost of a first-class battleship, later commuted for an annual payment of £30,000, to which Natal added £12,000. In 1902<sup>4</sup> the matter was again debated and a new agreement reached. As subsequently modified the agreement secured a squadron of one first-class cruiser, three second-class cruisers, and five third-class cruisers, and a Royal

<sup>1</sup> Cf. Commonwealth *Official Year Book*, ii. 1082 f.; iii. 1052 ff. A project for an Australasian force, half paid for by the Colonies, was mooted in 1869; see *Parl. Pap.*, C. 83, pp. 522 ff.

<sup>2</sup> *Parl. Pap.*, C. 5091, pp. 489-511; 51 & 52 Viet. c. 32; Quick and Garran, *Const. of Commonwealth*, pp. 116, 562.

<sup>3</sup> *Parl. Pap.*, C. 8596.

<sup>4</sup> *Ibid.*, Cd. 1299; Commonwealth Act No. 8 of 1903.

Naval Reserve of 25 officers and 700 seamen and stokers. One was to be kept in reserve, three partially manned for training the Royal Naval Reserve, and the rest in full commission. Australians were, as far as possible, to man the three drill ships and one other, but they were to be officered by officers of the Royal Navy and the Royal Naval Reserve. The cost was to be borne up to one half, but not exceeding £200,000, by Australia, now federated, and £40,000 by New Zealand. The agreement was accepted by the Commonwealth by Act No. 8 of 1903, but only after a serious Parliamentary struggle, during which Mr. Higgins<sup>1</sup> declared that the expenditure could not be justified under the terms of the Constitution, and, without difficulty, by Act No. 30 of 1903 in New Zealand.

Mr. Deakin,<sup>2</sup> who took the place of Sir E. Barton, whose chilly reception after the Conference of 1902 hastened his retirement to the Supreme Court, showed his appreciation of the desire of the Commonwealth for its own force by proposing to the Admiralty that there should be a local navy which might be placed in time of war under the Admiralty, but in peace would be wholly under local control. He argued that the view of the Colonial Defence Committee that Australia was safe against any serious attack, and, even if the Imperial squadron were removed, need only fear some commercial raiding, was not satisfactory, for the damage done by such raiders, even if secondary in importance, might be serious for the Commonwealth. Difficult questions arose. Since the Act No. 20 of 1903 the State ships had come under the Commonwealth and claims for an extended legislative power were based on s. 51 (vi) giving legislative authority as to defence, and on s. 5 of the covering Act of the Constitution, which made the laws of the Commonwealth apply to all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination were in the Commonwealth. A Commonwealth navy, it was argued, would not be in the sense of the Constitution the Queen's ships of war, but would fall under Commonwealth defence law, even outside territorial

<sup>1</sup> *Parl. Deb.*, 1903, pp. 1997 f.

<sup>2</sup> *Parl. Pap.*, Cd. 3523, pp. 128 ff., 469 ff. ; Cd. 3524, pp. 38-71 ; *Parl. Pap.* (Commonwealth), 1901, No. 52, A. 12 ; 1905, No. 66 ; 1906, Nos. 44, 81, 82 ; 1907-8, Nos. 6, 143, 144 ; 1908, Nos. 6, 37.



waters.<sup>1</sup> The distinction in point of fact is recognized in the *Navigation Act*, 1912. There was still more doubt as to the international position; the Admiralty demanded full control in time of peace or war alike over the movements of Commonwealth ships from this point of view, and were only willing to work out the theory of a semi-autonomous navy, subject to this issue being solved. After discussing the issue at the Colonial Conference of 1907 with the Admiralty, Mr. Deakin on 16 October made proposals for the provision by Australia of 1,000 seamen, for service on board two cruisers to be kept in Australia at a cost of £100,000, and the provision of defence works and submarines or destroyers, as an independent unit. The Admiralty in reply in August 1908<sup>2</sup> adumbrated a scheme which would provide nine submarines and six destroyers as a local unit under Commonwealth control, while in Australian waters, passing under Imperial control beyond those limits, unless otherwise arranged and coming under Imperial control in war. New Zealand, on the other hand, spontaneously in 1908 by Act No. 225 increased her contribution unconditionally to £100,000.

The whole situation was drastically changed by the revelation in 1909 of the grave position of European affairs<sup>3</sup> and the Imperial Government's decision to increase the navy. Canada passed in the House of Commons on 29 March a resolution affirming the view that the naval supremacy of Britain was essential to the security of commerce, the safety of the Empire, and the peace of the world, and declaring readiness to organize a Canadian naval service in close relation to, and co-operation with, the Royal Navy, on the lines suggested at the Conference of 1907. New Zealand<sup>4</sup> offered one or two Dreadnoughts, New South Wales and Victoria, indignant at the sluggish action of the Labour Government in the Commonwealth, offered one if the Commonwealth failed to act; that Government suggested the creation of an Australian flotilla, the control to be as suggested by the Admiralty in August 1908. An invitation to a subsidiary naval and military Conference was issued by the Imperial Government on 30 April 1909, and the Conference—

<sup>1</sup> Contrast *The Brisbane Oyster Fishery Co. v. Emerson*, Knox, 80, 86, per Martin, C.J. (N.S.W.).

<sup>2</sup> *Parl. Pap.*, Cd. 4325, pp. 48–56.

<sup>3</sup> *House of Commons Deb.*, ix. 955 ff.

<sup>4</sup> *Parl. Pap.*, Cd. 4948, p. 1.

at which the Commonwealth was represented by a new Ministry, the Labour Government having been defeated on the score of its failure to make a sufficiently generous offer of defence—met in July and August. New Zealand then preferred to adhere to a contribution; Australia desired a local unit and it was agreed to create a Pacific fleet of three units, in China waters, Australia, and the East Indies, each unit consisting of a large cruiser, three second-class cruisers, six destroyers, and three submarines. Australia was to provide the armoured cruiser for her unit, New Zealand that of the China unit, and some of the smaller ships of that unit would have their headquarters in New Zealand waters, though the whole unit would be under the Admiralty. The Australian unit, on the other hand, was to possess an autonomy, subject to arrangements for identity of training, discipline, &c., and she would take over the dockyard at Sydney. Canada proposed to build cruisers and six destroyers over nine years, to guard her two coasts and to take over the Admiralty property at Halifax and Esquimalt, which was duly surrendered in 1910–11 by the Admiralty. The Cape and the other South African colonies could do nothing pending union.<sup>1</sup>

Canada legislated in 1910 (c. 43) to control her new squadron, assuming that she possessed extra-territorial authority, and the Commonwealth<sup>2</sup> followed suit by Act No. 30 of 1910. The Canadian Act provided that in emergency the Governor in Council might place the fleet and its officers and men under the Crown for service in the Royal Navy, in such event Parliament to be summoned within fifteen days if not sitting or due to meet earlier. Otherwise the code governing the Royal Navy would normally apply to the Canadian forces, unless otherwise provided for by Canadian regulation under the Act. Bitter controversy<sup>3</sup> was excited by the Act; Messrs. Monk, Bourassa, and Lavergne attacked the Government as accepting responsibility for all British wars and providing Canadians to fight

<sup>1</sup> *House of Commons Deb.*, ix. 1310–13. For Natal naval volunteers, see Act No. 33 of 1907; for contributions No. 5 of 1903; Cape No. 20 of 1898.

<sup>2</sup> The loan for construction contemplated by Act No. 14 of 1909 was dropped by the new Government (No. 6 of 1910), which accepted its predecessor's policy. New Zealand, by Act No. 9 of 1909, provided the funds for the *New Zealand*.

<sup>3</sup> Skelton, *Sir Wilfrid Laurier*, ii. 316 ff.

British battles ; Mr. Borden, on the other hand, thought that immediate pecuniary aid should have been forthcoming pending the creation of a truly Imperial fleet ; Sir W. Laurier maintained his usual ground : Canada undertook no automatic engagement in British wars, but equally she could not be indifferent to them, and must be prepared to defend herself at any rate. The Commonwealth Act <sup>1</sup> provided for transfer to or from the Imperial forces, subject in the first case to the summoning of Parliament ; adopted, subject to changes made by the regulations under the Act, the general Admiralty code ; and provided that in the case of co-operation of Imperial and Australian forces the command should, subject to Imperial Act or regulations, devolve on the senior officer.

The arrangements for close co-operation with the Imperial navy and for international intercourse remained to be determined, and were disposed of at the Imperial Conference of 1911. The Canadian and Australian fleets were given the title royal, and permitted to fly at the stern the white ensign, with the Dominion flag at the jack-staff, and were assigned fields of action, the Canadian and Australian naval stations. The Admiralty was to be informed whenever either fleet was sent to visit any British possession ; if a foreign port were to be visited the concurrence of the Imperial Government was to be obtained, so that the necessary arrangements might be made with the foreign power through the Foreign Office. When in a foreign port the commander of any Dominion vessel must report to the officer commanding the station or the Admiralty, and must obey any instructions received from the Imperial Government as to the conduct of international incidents arising, the Dominion Government being informed. Similar procedure was enjoined where a Dominion vessel had through storm or other cause to put in without notice to a foreign port. On a Dominion and British ship meeting the senior officer would command as regard ceremonial or international intercourse, or when joint action was agreed on, but would have no power to direct the movements of the other vessel unless this was agreed on as part of a co-operative action. Arrangements would be made for training with the Imperial forces, the senior

<sup>1</sup> *Parl. Deb.*, 1910, pp. 4489 ff., 5667 ff., 1650 ff. £2,590,000 was appropriated. See also No. 21 of 1912 ; 12 & 13 Geo. V, c. 37, s. 6.

officer commanding but not interfering needlessly in domestic economy. In war, if the fleet of a Dominion were put under the Admiralty, it would be treated as incorporated in the Royal Navy for the time being. It was agreed that the necessary officers for courts martial should be lent by the Admiralty when required, and officers would also be given on loan, who would count their Dominion service for seniority, promotion, &c., and there would be a common list of officers for seniority by date of their commissions in the three services. Changes in regulations were to be discussed among the governments, the Dominions having adopted the general principle of applying the Naval Discipline Act, the King's regulations, and Admiralty instructions to their forces.<sup>1</sup>

It remained to make the new scheme effective by passing the *Naval Discipline (Dominion Naval Forces) Act*, 1911. It applies to the naval forces of any Dominion, to which before or after the Act the provisions of the *Naval Discipline Act*, 1866, and amending Acts have been made applicable, the Act of 1866 as amended, subject to any adaptations made by the Dominion, to fit the Act to local circumstances, such as the substitution of Governor-General for Admiralty; it also empowers the Crown to modify the Act of 1866 by Order in Council in order to regulate the relations of the Imperial and the Dominion forces, provided that, if the Dominion forces are placed under the Admiralty, the Act of 1866 will apply to them without any modifications. The Act was made dependent for its operation on adoption by any Dominion, the right to annul this adoption presumably being admitted, though this was left uncertain. Adoption by the Commonwealth followed in 1912; from 1 July 1913 the Naval Board of the Commonwealth took over charge of the fleet under the Act of 1910; a naval college was opened at Jervis Bay to train officers and the *Tingira* started training boys, who were to serve until twenty-five in the navy. The necessary Order in Council was issued on 12 August 1913. The Commonwealth had before it as an ideal a scheme devised by Admiral Sir R. Henderson,<sup>2</sup> which was to give the Commonwealth a powerful fleet. New Zealand in 1913,<sup>3</sup> under Mr.

<sup>1</sup> *Parl. Pap.*, Cd. 5746-2.

<sup>2</sup> *Parl. Pap.*, Cd. 6091, p. 15.

<sup>3</sup> For the circumstances, see Keith, *Imperial Unity and the Dominions* pp. 326-8; Act No. 45 of 1913.

Massey's Government, changed its policy, and decided on having a local navy, adopting the Imperial Act of 1911, the necessary Order in Council being issued on 16 July 1914. In Canada, however, the progress of the local navy was very slow, for the new Government in 1911 felt that the policy of a small local fleet was inadequate for the emergency.<sup>1</sup> After his visit to England in 1912, above referred to, Mr. Borden<sup>2</sup> asked the House of Commons for 35 million dollars in order to present to the Admiralty three battleships or battle cruisers, this being deemed by the Admiralty the most urgent need of the time; he supported his suggestion by mentioning that British naval expenditure on Canada in 1870-90 was between 25 and 30 millions, and military expenditure in 1853-1903 about 23 millions. Sir W. Laurier opposed the proposal very bitterly,<sup>3</sup> demanding a reference to the people, which was refused by the Commons, and the Bill passed third reading by 114 to 84 votes, some French Canadians turning against the Government. But in the Senate it was rejected by 51 to 27 votes, out of personal loyalty to Sir W. Laurier, though it was manifestly discreditable that the will of the people should be thwarted, and the interest of the Empire endangered, by a number of ancient and feeble nonentities, whose presence in the Upper Chamber was proof of their unfitness for any useful purpose. The Government declined to take the rebuff as justifying any effort to hasten the construction of a local fleet which Sir W. Laurier had proposed as an alternative, but the Commons had rejected. In the case of the Union the *Defence Act*, 1912, contemplated only the creation of a South African Division of the Royal Naval Volunteer Reserve, continuing the forces of the Cape and Natal, and Newfoundland had had since 1902 a force of the Royal Naval Reserve.

#### § 6. *Dominion Naval Co-operation in the War*

On the outbreak of the war, indeed on 3 August 1914, New Zealand placed her one small cruiser, the *Philomel*, under the Admiralty; it was used for patrol work in the Indian Ocean, Persian Gulf, and Red Sea before being paid off in 1916. The training ship *Amokura* at Wellington performed a valuable

<sup>1</sup> Canada *Commons Deb.*, 18 March 1912; Keith, op. cit., pp. 320 ff.

<sup>2</sup> *Parl. Pap.*, Cd. 6513; cf. Cd. 6889.

<sup>3</sup> Skelton, ii. 396 ff.

service in providing a steady flow of recruits for the navy and mercantile marine. The Naval Reserve itself passed to Imperial control on 3 August. The Act of 1913, unlike those of Canada and the Commonwealth, provided for immediate transfer to Imperial control on the outbreak of war. This, however, made no difference in actual celerity, for Canada at once made over the *Rainbow* and the *Niobe*, her small cruisers, and the British Columbian Government with praiseworthy initiative purchased at Seattle and presented to the Admiralty a couple of submarines originally built for Chile. The response of Newfoundland was remarkable; the Naval Reserve developed as a result of the Conference of 1902 was popular with the men, and they hastened to rejoin the drill ship *Briton* at St. John's; 100 of them in September helped to man the *Niobe*, and in all 1,964 served during the war, of whom 179 perished and 125 were invalided out of the service. Their work was done in many seas and places, at the battle of the Falkland Islands and at Jutland, but their special *métier* was patrol work, for they were invincible in the dangerous art of handling small craft in stormy seas.

The Commonwealth Navy was formally placed under the Admiralty on 10 August 1914, but this was merely due to oversight; it had come under Admiralty directions on the eve of war and the flagship was steaming north to seek the enemy cruisers in the Bismarck Archipelago. The fleet thus handed over in due course comprised the battleship *Australia*, 19,200 tons; the cruisers, *Melbourne*, *Sydney*, *Brisbane*, 5,400 tons; *Encounter*, 5,900 tons; two small cruisers, *Pioneer*—given by the British Government—and *Psyche*; six destroyers; two ill-fated submarines, both of which perished, by accident and capture, in the first year of the war; the old gunboats *Protector* and *Gayundah*; and two sloops, *Fantome* and *Una*. The *Psyche* and *Fantome* were handed over by the Admiralty to be manned by Australians in 1915, the *Una* was captured from Germany in October 1914. The Australian submarine depot ship *Platypus* and the oil-tanker *Korumba* were taken over by the Admiralty for service in European waters, and seventy-six other vessels were used in patrol and mine-sweeping work. At the end of the war the Royal Australian Navy numbered 325 officers and 4,647 men. The first duty of the squadron was to

secure the safe passage to Samoa of Col. Logan with 1,400 New Zealanders, who occupied that island, while another expedition of Australian military and naval forces seized German New Guinea. The *Australia* then made for Fiji, where her presence compelled Admiral Von Spee to make for South Africa, ending up in recall to England for service in the North Sea. The *Melbourne* and *Sydney* engaged on convoy work, during which the *Sydney* destroyed the *Emden* on 9 November at the Cocos Islands; after this the cruisers went on patrol work between Halifax and Panama; the smaller craft were largely used in patrols in the Bay of Bengal and Malay Archipelago, while the antiquated *Pioneer* was sent to East Africa, where she helped to destroy the *Königsberg*. The *Brisbane* when put in commission went to Malta, where the destroyers also were sent. Some damage to shipping was caused in 1917 by the German raiders *See Adler* and *Wolf*, but no attack was even attempted on the coast. The Royal Australian Naval Reserve—renamed Naval Brigade—provided men for the capture of the German wireless station at Blanche Bay, and for a detachment which served usefully in Egypt and Palestine as the Bridging Train.

### § 7. *The Dominion Navies since the War*

Even before the close of the war the Admiralty had thought it wise to seek to secure the assent of the Dominions to the doctrine that it was desirable to have a single Imperial fleet, the advantages of which were set out in a memorandum of 17 May 1918, submitted to the Prime Ministers of the Dominions. Their reply under the influence of Canada and the Commonwealth on 15 August<sup>1</sup> was firm; they recognized the strong arguments adduced for one control, and a unified fleet; but, while they admitted the necessity of uniformity in construction, equipment, and armament, and in methods of training, administration, and organization, they thought this could be secured with local control, as in the case of the Commonwealth, the control in war being handed over to the Admiralty. It was recognized that with the growth of Dominion forces there might come a time when it would be necessary to create an Imperial organization to control an Imperial fleet, but this

<sup>1</sup> Canada *Commons Debates*, 14 June 1920. See Keith, *War Government of the Dominions*, pp. 136 ff.; 8 & 9 Geo. V, c. 34; *S. R. & O.* 1920, Nos. 1406–9.

was not at once requisite. Canada, however, passed this year the necessary Act to accept the Imperial Act of 1911. In 1919 Admiral of the Fleet, Lord Jellicoe, was sent on a tour of inspection and advice, resulting in elaborate reports explaining clearly the principles of naval strategy and the necessity to Australia of being assured of the protection of the British fleet. The complete interdependence of the various problems of defence was emphasized and a plan adumbrated of co-operation between the Imperial and Dominion governments through the creation of the office of Commander in Chief at Singapore. This officer would be in close touch with the Imperial China and East Indies squadrons, and those of Australia and any other Dominion, and under him in war would normally fall the whole of the fleets in the Far East. He contemplated a very powerful fleet to which Australia, New Zealand, and Canada might contribute, while the Union should maintain a squadron at the Cape to guard trade on the west coast, leaving that on the east coast to the case of the Far Eastern fleet. He suggested as a basis of cost of naval expenditure generally, United Kingdom, 74·12, Australia, 7·74, New Zealand, 2·02, Canada, 12·30, and South Africa, 3·82. His proposals were not welcomed in the Dominions. The Minister for Naval Defence in Canada explained in 1920 that the Government thought that it was too early to decide on any scheme ; in the meantime it accepted a light cruiser, two destroyers, and two submarines from the Imperial Government, meditating a return to Sir W. Laurier's policy of 1910 on a reduced scale. Mr. King and Mr. Lemieux were unwilling even to do this, in view of the defeat of Germany and the satisfactory relations with the rest of the world. In the meantime Canada fell in line with the other Dominions by securing the issue of Orders of Council of 28 June 1920 placing the Dominion on the same footing as regards relations with the Imperial forces, common commissions, &c., as Australia and New Zealand. Australia also in 1920-1 reduced drastically her establishments, but accepted one flotilla leader, five destroyers, six submarines, and three sloops, while New Zealand received a cruiser. In the Union General Hertzog attacked the continuation of the small grant of £85,000 to the Imperial navy, while Mr. Merriman observed on its incredible meanness, reviving Mr. Hofmeyr's suggestion of a tax on imports as a



contribution to the navy, and General Smuts displayed a theoretic love for a local force with a practical determination not to pay for one, a view accepted by Col. Creswell for Labour.

The outcome of the Washington Conference of 1921-2<sup>1</sup> by laying down a basis of equality for the British and United States fleets as regards battleships involving the destruction of the *Australia*—accomplished on 12 April 1924, and by achieving an amicable settlement of the difficulty of the renewal of the Japanese alliance in the shape of a treaty of mutual guarantee of the island possessions of the four powers, United States, United Kingdom, France, and Japan, led to a further decline in interest in naval affairs, which was accelerated in the case of Canada by the advent to power in 1922 of the Liberal government. Expenditure was cut by a million dollars, H.M.C.S. *Aurora* was laid up with the two submarines, the destroyers *Patrician* and *Patriot* kept for training purposes, and some trawlers for mine sweeping, mine laying, and port defence work; in 1923 the proposals took shape in the organization of the Royal Canadian Naval Reserve of 500 officers and men, accustomed to seafaring, and a Volunteer Reserve of double that strength of men not seafaring normally. The distinct ministry for the navy disappeared in the Ministry of Defence, the naval college ceased to function, but the barracks at Halifax and Esquimalt remained in use as training establishments and depots. The obvious inadequacy of naval defence was commented on by Vice-Admiral Sir F. Field when he called at Canada with the Special Service Squadron which toured the Dominions in 1924, his remarks arousing some comment in Parliament,<sup>2</sup> but the vast majority of Canadians remained content to rely for defence on the Monroe doctrine and the British navy.

This indifference of Canada was manifested clearly at the Imperial Conference of 1923 when the Imperial Government asked Dominion support<sup>3</sup> of the scheme for the expenditure of 11 millions on supplying a first-class dock at Singapore. Australia, New Zealand, and official India approved; South Africa objected; and Canada was neutral. There was, however,

<sup>1</sup> *Parl. Pap.*, Cmd. 1627.

<sup>2</sup> *Canadian Annual Review*, 1924-5, p. 48.

<sup>3</sup> This had not materialized in 1926; the writer's prophecy in *Edinburgh Review*, July 1923, p. 14, having proved painfully true.

a widespread feeling that the policy was deliberately provocative to Japan, and that it would be wiser to cultivate good relations with a former ally than expend sums on a base which, if the views of Sir P. Scott and Mark Kerr as to the obsolescence of the battleship were correct, would be no sooner completed than it would be antiquated. A vague assurance of aid was given by Australia, while New Zealand decided to pay £100,000 a year as a contribution to the cost. The decision of the Labour Government in 1924 to abandon the Singapore scheme was not very seriously resented even in Australia and New Zealand, but both welcomed the determination of Mr. Baldwin's Government in 1925-6 to proceed, if slowly, with the project, though it was felt that the leisurely mode of action was inconsistent with assertions of the Imperial importance of the scheme, the Admiralty evidently preferring to be given new cruisers rather than a new base.

In Australia in 1923 the effect of the Washington treaties was seen in the reduction of the number of men to 3,500 and of vessels in commission to thirteen from twenty-five. In 1924, however, partly as a result of the apparent failure of the Imperial Government to provide adequately for Australian defence, a more manly attitude was decided upon, and in 1925 orders were definitely placed for two cruisers of the maximum size (10,000 tons) permitted under the Washington Treaty, two submarines of the ocean-going type, and one seaplane carrier of 6,000 tons, this one only to be constructed in Australia by the Commonwealth Shipping Board. It was agreed also to subsidize by £135,000 the New South Wales Government to build a floating dock to be available in war or emergency. The Naval College at Jervis Bay is maintained to train some fifty boys a year, examination being open to all boys in their thirteenth year, the final selection being made from those qualifying; boys from  $14\frac{3}{4}$  to  $16\frac{3}{4}$  are eligible for training in the *Tingira* at Sydney, on undertaking to serve to 30. There is also the Royal Australian Naval Reserve of some 6,800, composed of citizen naval trainees.

In New Zealand, following the example of the Commonwealth, a Naval Board was constituted by Order in Council of 14 March 1921, charged with the control and executive command of the unit, which by Order in Council of 20 June was named 'The

New Zealand Division of the Royal Navy'. The Board consists of the Minister for Defence, the Commodore Commanding, his Chief Staff Officer, and his Secretary. The *Chatham*, provided by the Imperial Government, was replaced in 1924 by the *Dunedin*, an oil-burning cruiser of very recent type, and the *Diomedé* was also taken over in 1926. Men of the New Zealand Division are recruited for 12 years with option to re-engage for periods of 5 years, up to 22 years' service, substantial gratuities being accorded at 12 and 22 years' service. On retirement the men become reservists liable to be called up in time of war only. The Royal Naval Reserve constituted under legislation in 1922 includes also men who enlist voluntarily and are required to undergo a specified training.

In the Union, General Hertzog, in 1925 and 1926, frankly admitted that it was the intention of the Nationalists to rely on the gratuitous protection of the Imperial Government. General Smuts had preceded him in this policy in 1921, when the derisory contribution of £85,000 a year was dropped, the Union Government undertaking to spend money on oil tanks, survey operations, minesweeping, and the increase of the South African Division of the Royal Naval Reserve. This last body consists of citizens who elect to enter it in lieu of undergoing military training; it consists of five companies; there are also two minesweeping trawlers and one survey sloop, all administered by the Commander, South African Division, under the orders of the Commander-in-Chief, African Station, whose head-quarters are at Simonstown.

A most interesting development has been the interchange of ships<sup>1</sup> of the Australian and British navies, thus affording the Dominion vessels an invaluable opportunity of partaking in fleet exercises, which would otherwise be denied to them. Yet events in China evoked on 25 June 1925 a Labour attack on the Government of the Commonwealth on the score that H.M.A.S. *Brisbane* was engaged in warlike operations in China, intervening in the domestic affairs of that people.<sup>2</sup> Mr. Hughes, curiously enough, added his objections to the position, answering the argument that it was surely right that a transferred ship should be used freely by the Government to which it was

<sup>1</sup> The *Brisbane* for the *Concord* in 1925; the *Melbourne* for the *Delhi* in 1926.

<sup>2</sup> *Parl. Deb.*, 1925, pp. 703 ff., 763, 850.

transferred, by the contention that in practice a British ship transferred to the Commonwealth would not be prepared to obey any instruction to take warlike action without Imperial authority. Mr. Bruce adopted the attitude that it was understood between the Governments that hostile use of a transferred vessel should be made only for purposes of protecting lives and property of British subjects, as in the case in question, and he added that many Australians were, in point of fact, resident in China and entitled to the full protection of the Empire and the Commonwealth.

On 11 March 1926 the First Lord of the Admiralty gave striking figures of the comparative naval expenditure of the Dominions and the United Kingdom, when intimating the decision of the Indian Government to reconstitute the Royal Indian Marine as a combatant force and to continue the payment of £100,000 annually towards the expenses of certain ships in Indian waters. The Straits Settlements was paying for the site of the Singapore dock, £146,000; Hong Kong had given £250,000; the Australian estimates for 1925-6 were £2,421,000 plus £1,500,000 in respect of new construction; New Zealand was spending over £500,000, Canada £280,000, and South Africa £140,000 as compared with £58,100,000 for the United Kingdom for 1926-7, a reduction of £2,400,000 on the preceding year. In 1925-6 the figures of expenditure per head were: United Kingdom £1 6s. 10d., Canada 0.15 dollars, Commonwealth 13s. 2d., New Zealand 8s., Union 1s. 9d. Taken in proportion to £1,000 of export and import trade the figures were: United Kingdom £26 17s. 7d., Canada 0.75 dollars, Commonwealth £12 8s. 2d., New Zealand £4 19s. 11d., and Union 18s. 11d.<sup>1</sup>

<sup>1</sup> Compare a candid view in *The Round Table*, xiv. 859 ff. Malaya gave, in 1926, £2,000,000, but, of course, this means Imperial pressure, or the complaisance of the Sultans, not popular will. In April 1927, New Zealand promised £1,000,000 in seven or eight instalments for Singapore. The total defence expenditure in 1924-5 was per head: United Kingdom, £2 13s. 8d.; Canada, 5s. 6d.; Australia, 18s. 1d.; New Zealand, 9s. 10d.; South Africa, 13s. 1d.; Irish Free State, 18s. 11d.; India, 3s. 3d.

## XI

### HONOURS

#### § 1. *Titles of Honour*

THE prerogative of honour vitally concerns the Crown,<sup>1</sup> and it is, therefore, neither delegated to Governors nor dealt with by Dominion Acts. It is perfectly true that such Acts might provide for local titles, but they would have no Imperial validity, and the divorce between the Crown and the recipient would deprive them of most if not all their value. Lord Elgin<sup>2</sup> very clearly pointed out the value of honours as a mark of the connexion between the Crown and the Colonies, and he insisted that the bestowal of honours could not be relegated to ministerial advice, but must rest on Imperial advice. This is clearly still the case ; an Imperial honour must rest on the advice of an Imperial minister, for the Crown, save as regards the Royal Victorian Order, its special preserve, is not in use to act on any save ministerial advice, normally that of the Prime Minister, and formally, in certain cases, that of the appropriate Secretary of State. To inform himself, however, the Secretary of State must have advice, and, if he looks still primarily to the Governor as the King's local representative, he must give increasing weight to ministerial advice. It is true that in 1879 knighthoods were conferred on two members of the New Zealand Opposition behind the back of Governor or ministers,<sup>3</sup> but that procedure was even then irregular, and Sir G. Grey's protests were later vindicated by the dropping of the giving of political honours to any members of the Opposition or public servants save on ministerial advice. It is otherwise with honours for art, science, literature, philanthropy, and public services in general ; ministerial advice in these cases is not absolutely essential. Still less, of course, is there any

<sup>1</sup> Cf. 31 Hen. VIII, c. 10 ; *Earl Cowley v. Countess Cowley*, [1901] A. C. 450, 456 ; *A.-G. for Dominion of Canada v. A.-G. for Province of Ontario*, [1898] A. C. 247, 252 ; *In re Bedard*, 7 Moo. P. C. 23.

<sup>2</sup> Walrond, *Letters and Journals of Lord Elgin*, p. 114. Cf. Pope, *Sir John Macdonald*, ii. 237 ff. ; Molteno, *Sir John Molteno*, i. 341.

<sup>3</sup> *Parl. Pap.*, 1879, A. 9 ; 1880, A. 2.

obligation to accept all the proposals of ministers. The Imperial Government must decide on the issue of numbers to be allotted. On solemn occasions, such as that of the federation of Canada and the union of South Africa, political honours were granted to members of different political parties on Imperial responsibility. Sir O. Mowat's honour was asserted to have been thus conferred,<sup>1</sup> but on 11 November 1907, when Sir C. Tupper was made a Privy Councillor, it was expressly stated to be on the advice of the Prime Minister.<sup>2</sup>

Difficulty has arisen especially in the case of the Commonwealth, for there the States and the Commonwealth may recommend for honours, and, as a means of securing some uniformity of standard, the recommendations of the States pass before the Governor-General, not his ministers, a procedure to which advocates of State rights take exception. But there seems no constitutional ground for objection, for the Imperial Government has a right to inform itself by the best means available of the relative strength of competing suggestions. More delicate is the claim raised by South Australia that no South Australian should be recommended for a Commonwealth honour without the sanction of the State Government, for that involves an inroad on the right of the Commonwealth. The Government of South Australia also secured, on 25 September 1924, the passage of a Bill forbidding any recommendation by the Governor or any Minister of the bestowal of a dignity or title of honour save with the approval of both Houses of Parliament by resolution, but the Legislative Council threw it out on 2 October. The redoubtable Mr. Higinbotham<sup>3</sup> desired honours—apparently life peerages—to be bestowed by the Governor with the approval of the Colonial Parliament.

Dislike of honours as undemocratic occasionally appears in Parliamentary debates in the Colonies, as in New South Wales in 1882,<sup>4</sup> but little serious trouble arose. Sir W. Laurier<sup>5</sup> indeed was of opinion that no honours should be bestowed in Canada save on his recommendation as Prime Minister, representing the Government, but Mr. Chamberlain reminded him

<sup>1</sup> Biggar, ii. 601 f.

<sup>2</sup> *Canadian Annual Review*, 1908, p. 25.

<sup>3</sup> Morris, *Memoir*, pp. 209 ff.

<sup>4</sup> *Parl. Deb.*, 1882, pp. 460 ff.

<sup>5</sup> It appears from Skelton, ii. 276 ff., that his views varied. Finally (ii. 550) he recognized how wrongly he had acted in accepting his own title.

that honours were Imperial, and only made the concession that the Dominion Government should be responsible for all recommendations because of political or administrative service, while, in all other cases, recommendations might be made by the Government or the Governor-General, subject to his obligation to allow the Prime Minister to make observations on them. It remained, of course, for the Imperial Government to decide which recommendations to accept. The relation of the other Ministers to the Prime Minister as regards recommendations, it may be noted, is not defined in any binding manner, but the rules of Cabinet consultation in the Dominions render it practically necessary that the Prime Minister should consult his colleagues, save perhaps if they are the objects of his solicitude. Sir W. Laurier acquiesced, but in 1914 the feeling of the Dominion was definitely becoming hostile to honours, and the folly of bestowing them in the form of a baronetcy on a war profiteer—as his detractors rated him—and in that of a peerage on a newspaper proprietor, brought about a crisis.<sup>1</sup> The public, in church conventions, trade union conferences, grain growers' and farmers' gatherings, demanded that the new National Government at Ottawa should recommend no more honours, especially when it became known that the Imperial Government had offered a couple of hundred or so of the new British Empire Order, that reward of incompetence and servility, to the Dominion. But it was hereditary titles that were most denounced as incompatible with the political, social, and economic conditions of the Dominion. A resolution of 8 April 1918 was passed by the Government by submitting a request prepared for presentation to the Imperial Government. It asked that no hereditary title should be conferred on a British subject resident in Canada, and that steps should be taken by legislation to secure that no title of honour held by a British subject resident in Canada should have hereditary effect. Other honours (save those for war services or granted *proprio motu* by the King) must be conferred only on the advice of, or with the approval of, the Prime Minister of the Dominion, though the number to be conferred

<sup>1</sup> Keith, *J. C. L.* i. 11-13; *War Government of the Dominions*, pp. 280 ff.; *Canadian Annual Review*, 1919, pp. 157-71. The resolution of 1919 is often overlooked, and that of 1918 only cited.

and their character must rest with the Imperial Government. In 1919, however, Mr. Nickle carried the matter further by proposing that no honours should henceforth be conferred on Canadians, and the Government had to fight hard to obtain, by 71 votes to 64, reference to a Select Committee. The report of that body was adopted on 14 May, after efforts had been made by the Government to secure some modification of its report, and was finally approved by the House by 96 votes to 43. An address was accordingly presented to the Crown, asking that the King might be pleased 'to refrain hereafter from conferring any title of honour or titular distinction on any of your subjects domiciled or ordinarily resident in Canada, save such appellations as are of a professional or vocational character or which appertain to an office'. It was further requested that every hereditary honour enjoyed by a person domiciled or ordinarily resident in Canada should be made to determine at his death. The Committee deprecated the use of foreign titles in Canada, approved of such military or naval distinctions as the Victoria Cross, and of the styles 'Right Honourable' and 'Honourable'. The resolution has been complied with by the Imperial Government so far as regards the cessation of granting honours, but nothing has been done regarding the hereditary titles, a curious commentary on the assertion of Dominion equality of status so often made in absolute terms. It must be added in fairness that Sir R. Borden must bear the responsibility for the original creation of these dignities, a *damnosa hereditas* to the Dominion. The strength of feeling in Canada was fully displayed in 1923, when Mr. J. Ladner<sup>1</sup> moved in favour of a restriction of the resolution of 1919 to permit of the conferring of decorations, not bearing titles, on those distinguished in literature, education, art, or science; the proposal, supported by Mr. Meighen, was negatived by 121 to 14, and it is extremely dubious if a majority could ever be found to renew the grant of titles.<sup>2</sup>

<sup>1</sup> *Canadian Annual Review*, 1923, p. 176. The high-minded among Canadian statesmen, like Mr. Fielding, have steadily refused these worthless decorations. The scandals accompanying the sale of honours in England are revealed in *Parkinson v. College of Ambulance*, [1925] 2 K. B. 1. It is difficult to understand the innate desire for these rewards.

<sup>2</sup> The Canadian bar in 1926 wisely declined to pass a resolution in favour of honours.



Australian opinion has been less decided, though Labour Governments have definitely dropped recommendations, and unsuccessful efforts have been made to induce the Commonwealth Parliament to follow the sensible example of Canada. In New Zealand hereditary honours proved fatal to Sir J. Ward, whose baronetcy cost him the respect earned by much solid achievement, and Mr. Massey, with greater wisdom and truer democracy, like 'King' Dick Seddon, declined any honour. In South Africa, where society rests on privilege and has servile traditions, the equality of the burghers has helped to achieve the result of the passing by a majority of 24 on 24 February 1925 of a motion begging the King to refrain from conferring titles on persons domiciled or living in the Union or its mandated territory.

It can only be a matter of earnest hope that Dominion politicians generally will realize that they add nothing to themselves by obtaining titles, and that honours have proved in the United Kingdom a deplorable source of corruption and injury to public life. The theory that they emanate from the sovereign personally is an idle farce, save in the case of the Royal Victorian Order, which is awarded to members of the royal household, who render services of a personal character which a Dominion statesman neither can nor wishes to render. Honours are conferred on the advice and responsibility of the Imperial Government<sup>1</sup> and have only such value as attaches to the recipient's own merits. Moreover, the sale of honours in the United Kingdom, which is clearly impossible of effective remedy, leads to deplorable results, of which a standing, but it may be feared not isolated, example is seen in the case of the Scottish baronet who owed his rank to payment to Mr. Lloyd George's party funds, from moneys earned by successful speculations in smuggling liquor into the United States. A failure in his plans resulted not merely in misappropriation of money but in suicide, whereupon the sum paid for the baronetcy was refunded, the net result being the addition of a new baronetcy without even a penny of profit to party funds, while many

<sup>1</sup> See Report of the Royal Commission on Honours, *Parl. Pap.*, Cmd. 1789. If the resolution of the Imperial Conference of 1926 (Part VIII, chap. iii, § 8) cuts off communications from the Governor-General of the Commonwealth, how are loyal Australians to receive their K.C.M.G.'s?

persons had suffered loss from being associated in business with one whom they imagined to have been honoured for public service by the Crown. It must be recognized that Canada, before the resolutions of 1918 and 1919, was advancing to the position where the Government would have claimed as of right to have honours conferred, and, if this position had once been attained, it is clear that contributions to party funds would inevitably have been, as in the United Kingdom, raised by this means. However great the temptation thus to simplify the difficulty of securing funds for electoral campaigns, it may be hoped that the Dominions will take warning by the example of the United Kingdom, and by refusing to ape British practices preserve themselves from a grave source of corruption. Sir Wilfrid Laurier clearly recognized in later life that he had gravely erred in accepting an honour, and it is a matter for regret that the manly attitude of Mr. Mackenzie King on this head has elicited no sympathy either from Sir Robert Borden or from Mr. Meighen, whose frank desires in this direction reveal a curious human frailty.<sup>1</sup>

The honours conferred are, rarely, peerages, the best deserved being that of Lord de Villiers, Chief Justice of the Union; baronetcies, of which the Union had five in 1925 but which have elsewhere been very rare; knighthoods, frequently given to Agents-General and judges, who seldom receive the K.C.M.G. unless they administer, and the various grades of the Order of St. Michael and St. George, the K.C.M.G. being granted usually after a C.M.G., C.B., C.V.O., or a knighthood, and the G.C.M.G. after the K.C.M.G. Sir W. Laurier, however, declined<sup>2</sup> to take anything save the G.C.M.G., a step of which he professed regret in later life, while the K.C.M.G. may be given at once, as usually to Governors, while Governors-General obtain the G.C.M.G., practically as a matter of course; the Labour Government in 1924 was guilty of the ludicrous absurdity of making Mr. J. O'Grady a K.C.M.G., though an obvious opportunity presented

<sup>1</sup> As in the United Kingdom, the episode of the acceptance by Mr. J. R. MacDonald of a life rent in £30,000 from a public benefactor whom he created a baronet caused an unfavourable impression in Canada; see *Canadian Annual Review*, 1924-5, p. 56. It had evidently been held that public dignity was higher in England than in Canada.

<sup>2</sup> Skelton, ii. 69 f., takes too kindly a view of Sir W. Laurier's frailty (cf. ii. 277).

itself for departing from a foolish precedent.<sup>1</sup> The Victorian Order is granted by the sovereign for personal services to the royalhouse, while the C.B. is sometimes used to reward Dominion services as a mark of distinction. The British Empire Order, superseding in use the Imperial Service Order, is definitely of inferior standing. Many of the most distinguished of Dominion statesmen have, like Mr. Deakin, declined any honour at all. The Privy Councillorship, however, now stands in a different light, as it is appropriate to admit Dominion Prime Ministers to it, as a sign of their status in the councils of the Empire, and it has become the rule that a Prime Minister of a Dominion shall be so appointed, unless he declines the honour. It is not, of course, essential, and Mr. Deakin refused even it.

Recommendations for Dominion honours appertain to the Secretary of State for Dominion Affairs, who, however, requires the approval of the Prime Minister for his lists, and he formally submits only those for the St. Michael and St. George.<sup>2</sup>

## § 2. *The Prefix 'Honourable'*

The title 'Honourable' is borne by all members of the Executive Councils in the Dominions, so long as they hold office, and, therefore, in those cases in which they do not retire from the Council on ceasing to be members of the Ministry for life, as in Canada, the Commonwealth, the Union, Victoria, and Tasmania. It is possible in other cases for the Governor to recommend the retention of the style by those who have served for three years, or, if Premier, for one year.<sup>3</sup> Legislative Councillors, but not Australian Senators, hold it during membership, while they may be recommended for retention after ten years.<sup>4</sup> Presiding officers<sup>5</sup> of the lower chambers bear the style during office, and may be recommended after three years' service, and the same rule applies to the President of the

<sup>1</sup> The Prime Minister's use of the prerogative caused painful surprise.

<sup>2</sup> The Crown has recognized a Maltese nobility and one Canadian barony. Baronetcies as a part of a hereditary system for the Upper House were suggested in 31 Geo. III, c. 31, ss. 6-11, and in New South Wales, Rusden, iii. 70.

<sup>3</sup> Given validity throughout the Empire by *London Gazette*, 16 June 1893. Cf. Southern Rhodesia *Statutes*, 1923, p. 182.

<sup>4</sup> Circular, 14 Nov. 1896.

<sup>5</sup> Dispatch, 10 March 1894. See South Australia, *Parl. Pap.*, 1910, No. 54, p. 61.

upper chamber. All these may be regarded now as of Imperial validity, and will be recognized in the United Kingdom as opposed to the use of the style 'Honourable' by members of the first Commonwealth Parliament, which was conceded, but subject to specific local limitation by dispatch of 23 March 1904. Members of the Canadian Executive Councils in the Provinces, Presidents of the Councils, and Speakers hold the style during office only, but local courtesy gives it for life.<sup>1</sup> The claim of Canada for 'Right Honourable' for her Privy Councillors advanced in 1867 was negatived on the score that it was the appropriate style of Imperial Privy Councillors.<sup>2</sup>

Judges of the Supreme Courts have the style 'Honourable' during office, and may be recommended for its retention on retirement.<sup>3</sup> Originally this was merely local, and Sir G. Grey in New Zealand<sup>4</sup> protested against this local limitation, but clearly without any right. The full recognition was delayed until 1911.<sup>5</sup> The style is applied to the judges of the Supreme Court of the Canadian provinces; in Canada the judges of the Supreme Court are officially referred to as 'their Lordships'.<sup>6</sup>

The Administrators of the Union provinces are styled 'Honourable'; Lieutenant-Governors in Canada 'His Honour'.

### § 3. *Salutes, Visits, Uniforms, and Medals*

Salutes are determined by the King under the prerogative; Governors-General, on first landing, on taking the oath of office, on leaving finally, or for a period of not less than three months, and on return from such leave, are entitled to 19 guns from the usual saluting battery; Governors must be content with 17, Lieutenant-Governors administering with 15. Similar salutes are due on visiting His Majesty's ships of war, or on arriving by one or leaving by one. Governors may also have the customary local salutes fired, on religious and other occasions, and at the opening or closing of Parliament, when, by

<sup>1</sup> *Canadian Annual Review*, 1905, p. 185.

<sup>2</sup> Pope, *Sir John Macdonald*, i. 391; ii. 4.

<sup>3</sup> *Victoria Leg. Ass. Journals*, 1877-8, App. B, No. 10; *Canada Statutes*, 1879, p. xli. So, e. g., Mr. Johnson in Newfoundland in 1926.

<sup>4</sup> *Parl. Pap.*, 1878, A. 1, pp. 15-18.

<sup>5</sup> *New Zealand Parl. Pap.*, 1910, A. 2, p. 74.

<sup>6</sup> Dropped in the Irish Free State, from the title Chief Justice; *J. C. L.* viii. ii. 40. For titles, see Const. Art. 5.

custom, guards of honour of the local forces are present and the National Anthem is played.<sup>1</sup>

Visits are likewise regulated by the King's instructions, which lay down that a Governor always receives the first visit from any naval commander, but a Lieutenant-Governor pays it to flag officers and Commodores, first class.

Uniforms are also regulated by the King. Governors have a special uniform, unless they are Admirals or Generals, when they wear their own uniform. The Civil uniform, second class, is allotted to Cabinet Ministers of the Dominions, save Newfoundland, and Lieutenant-Governors ; the third class to other Ministers ; the fourth to heads of principal departments ; the fifth to heads of minor departments and assistant heads of principal departments, but in these cases the sanction of the King obtained through the Secretary of State and the Governor is essential. In the same way permission may be given to persons to continue after retirement to wear a uniform actually worn while in office. These rules are probably, in their absurdity, taken less seriously than in England, where the Labour Ministry of 1924 excelled all records for assuming gay plumage.

All medals and decorations emanate from the sovereign, and none may be worn on official occasions without his approval. A medal issued without such authority by the Governor of New Zealand in 1869<sup>2</sup> was ratified *ex post facto* by the Crown, and the legal power of any Dominion to provide for the issue of medals under its defence legislation is not doubted. But it is clearly desirable that all medals should be valid Imperially, and be granted under conditions approved by the Crown, and in point of fact royal warrants have approved the issue of medals under the authority of Governors on conditions approved by the War Office and the Admiralty in respect of military and naval service in the Dominions. The acceptance and wearing of foreign decorations is regulated by the King for the whole of his dominions by notice issued from time to time by the Secretary of State for Foreign Affairs.

<sup>1</sup> For the application to Lieutenant-Governors in Canada, see Lord Kimberley, 7 Nov 1872 ; Ontario, *Sess. Pap.*, 1873, No. 67.

<sup>2</sup> *Parl. Pap.*, C. 83, pp. 42, 190 ; Rusden, ii. 547. The King gave a decoration to Republican officers in the Anglo-Boer War ; Buxton, *Botha*, p. 154.

§ 4. *Precedence*

Precedence as matter of the prerogative is regularly laid down, not by Act, though this is clearly possible,<sup>1</sup> but by letters patent, royal warrants, royal instructions, or more simply through the Secretary of State. Tables of precedence for any Dominion may be formally drawn up and approved by the Crown, or rest merely on established usage. Thus the precedence of Canadian puisne judges was regulated by dispatch of 31 October 1878, but altered by another of 3 November 1879;<sup>2</sup> a Commonwealth list approved by the King appeared in the *Gazette* of 30 December 1905, one for the Union in the *Gazette* of 30 September 1910, and a new list for Canada appeared on 22 December 1923, in the *Gazette*. Members of the royal family take precedence after the Governor. British subjects who in the United Kingdom enjoy precedence by right of birth or dignity conferred by the Crown do not lose it by residence overseas, but the value of this peculiarly foolish principle is impaired by the fact that officials naval, military, or civil in the Dominions rank by their official position, and the wives follow their husband's precedence. The validity, however, of the rule is dubious in any case, for the law officers advised on 30 April 1859<sup>3</sup> that neither birth nor title conveyed any precedence outside the United Kingdom, and that it was proper for the Governor to arrange precedence in these cases according to local conditions. Official precedence in the United Kingdom or elsewhere has of course no effect, and it falls to the Governor to decide what, if any, he will accord. On occasion members of the royal family may be accorded precedence above the Governor, as was the Duke of York when he opened the Commonwealth Parliament in 1901, or the Duke of Connaught when he performed the same action for the Union Parliament in 1910; more anomalous was the precedence accorded to the Prince of Wales in 1907 when he visited Canada, and it seems now settled practice not to accord such special

<sup>1</sup> e. g., as to ministers *inter se* in New Zealand, No. 31 of 1920.

<sup>2</sup> For a Canadian list of 1893, see *Colonial Office List*, 1904, p. 479; cf. Sir John Macdonald's views (Pope, ii. 240, 330 f.); on consular precedence in Canada, see *Commons Deb.*, 1909-10, pp. 853 ff.; 1910-11, pp. 973 ff.

<sup>3</sup> South Australia, *Parl. Pap.*, 1871, No. 115.

precedence. Sensible Governors avoid giving entertainments with formal precedence; Lord Beauchamp as Governor of New South Wales earned much deserved ridicule by his insistence on the private *entrée*.

Ecclesiastic precedence long occupied attention; Roman Catholic bishops were taboo, until a dispatch of 20 November 1847<sup>1</sup> allowed them to be given that style, and thereafter they usually ranked after Anglican bishops. This has since disappeared, and bishops of all kinds have merely courtesy precedence, ranking by date of consecration as bishop; archbishops take precedence of all bishops, and *inter se* rank by date of consecration as archbishop, not as bishop.<sup>2</sup> The special precedence of Anglican bishops was due to their creation at one time under letters patent; when these were held ineffective for the assumed purpose of giving jurisdiction, precedence was no longer officially conferred.<sup>3</sup> The heads of other denominations are accorded courtesy precedence in Canada, where the bishops are included in the table. The old dispute as to precedence between Imperial and Colonial military and naval officers has been settled by accepting the date of the commission, Imperial officers now serving under Dominion commissions.<sup>4</sup>

Statutory regulation of precedence is confined, as a rule, to one or two special appointments. An effort in South Australia in 1871<sup>5</sup> to take away the precedence of the bishop was negatived on the score that the matter was one of the prerogative, and in any case no change should be made during the incumbency of the bishop. But in 16 September 1872 a formal promise was made not again to grant precedence to any bishop without colonial assent. The Charter of Justice of New South Wales of 1823 under 4 Geo. IV, c. 96, gave the Chief Justice precedence after the Governor; the Constitution Act of 1855 left this unchanged, giving the power to alter to the authority then capable of doing so, i. e., the Crown, and in

<sup>1</sup> Duke of Newcastle, 3 May 1860; South Australia, *Parl. Pap.*, 1871, No. 115.

<sup>2</sup> Dispatch, 1910; Canada *Statutes*, 1911, p. vi.

<sup>3</sup> Secretary of State, 26 Jan. 1869; Victoria, *Parl. Pap.*, 1890, No. 38, p. 6.

<sup>4</sup> *Op. cit.*, pp. 7 ff.

<sup>5</sup> *Parl. Pap.*, 1871, No. 115; 1872, Nos. 61, 68. Cf. Victoria in 1868; *Deb.*, vi. 816 ff., 1101 f.

1910 the Admiral in command of the British squadron was preferred to the Chief Justice. In Victoria and Tasmania,<sup>1</sup> however, no change was made. The Newfoundland Charter of Justice under 5 Geo. IV, c. 67, gives the Chief Justice and Judges precedence after the Governor, subject to the precedence of any persons who by law or usage take precedence of the Lord Chief Justice in England, so that the judges yield to a Premier only if a Privy Councillor. In New Zealand in 1903 the Premier was given precedence over the Chief Justice, and so in the Union in 1910, the Prime Minister in the United Kingdom having been given precedence in 1905 after the Archbishop of York.

In the Commonwealth precedence is confused by the existence of State and Federal lists, which do not accord. The Federal list places State Chief Justices below judges of the High Court, and Premiers below their Chief Justices, while the States claim rank for their Premiers above federal Ministers and for their Chief Justices just after the federal Chief Justice. Sensible persons stay away from functions where they do not receive the precedence they are foolish <sup>2</sup> enough to desire.

Among the Dominions the official order is based on date, Canada a Dominion on 1 July 1867; the Commonwealth, 1 January 1901; New Zealand, a Dominion on 28 September 1907; the Union, 31 May 1910, and Newfoundland, which with the others is a Dominion in the sense of the style given by the Colonial Conference of 1907, but freely adheres to the style of Colony, for which Island is a variant in the Governor's commission. Malta (1921) and Southern Rhodesia (1923) are Colonies, while the Irish Free State ranks as a Dominion, the most recent. In the Covenant of the League of Nations South Africa, by reason of population, is placed above New Zealand, with India following.

Among the Australian States the order of population is adopted for enumerations, New South Wales, Victoria, Queensland, South Australia, Western Australia, and Tasmania; in the case of Canada date of federation, Ontario, Quebec, Nova Scotia, New Brunswick, original members by population,

<sup>1</sup> See Act No. 1142, s. 11; 19 Vict. No. 23.

<sup>2</sup> For de Villiers' comic concern for his precedence as Chief Justice of the Cape under the Charter of Justice of 1834, see Walker, pp. 116 f.



Manitoba (1870), British Columbia (1871), Prince Edward Island (1873), Saskatchewan, and Alberta. The order of provinces in the Union is by population, Cape, Transvaal, Orange Free State, and Natal.

### § 5. *Flags*

The Governor-General no longer enjoys the privilege of flying the royal standard at Government House on the King's birthday, and the anniversary of his accession and coronation,<sup>1</sup> but the Union flag pure and simple is flown daily on Government House. When on board ship the Governor uses the Union flag with the arms or badge of the territory emblazoned on a white shield, surrounded by a green garland. Armed vessels carry the blue ensign with the badge of the territory in the fly and the pendant; if unarmed, Government vessels do not use the pendant. Merchant vessels registered in the territory use the red ensign with the badge, if authorized by Admiralty warrant, as in the case of Canada,<sup>2</sup> the Commonwealth, New Zealand, and the Union; they may also carry distinguishing flags with the badge in addition to the red ensign, subject to s. 73 (2) of the *Merchant Shipping Act*, 1894. The navies of the Dominions,<sup>3</sup> however, carry the white ensign at the stern as well as the Dominion flag at the jackstaff. Yacht clubs, to which the King accords the right to use the style 'royal', are permitted by the Admiralty to carry the blue ensign with the club badge. The Governor's flag may be carried on the foretop-gallant masthead of an Imperial ship on which he is embarked, but this matter is regulated by the Admiralty.

While naval flags are thus regulated by law, no Dominion legislature having power to override the *Merchant Shipping Act*, save perhaps as regards registered and coasting vessels, it is open to the Dominions by Act or regulation to appoint for other matters the use of a special flag. That has been done in the case of New Zealand by an Act of 1901,<sup>4</sup> which represents a re-enactment with modifications of a reserved Bill of 1900,

<sup>1</sup> The change dates from 1911.

<sup>2</sup> See Ewart, *Kingdom of Canada*, pp. 65 ff.; 52 & 53 Vict. c. 73; Admiralty warrant, 2 Feb. 1892.

<sup>3</sup> *Parl. Pap.*, Cd. 5746-2.

<sup>4</sup> *Parl. Pap.*, 1902, A. 1, p. 9; 1903, A. 1, p. 6; A. 2, p. 10; cf. *Canadian Annual Review*, 1910, p. 132.

and provides a national flag, the Union Jack with Dominion badge, for New Zealand. There is no such comprehensive rule for the Commonwealth,<sup>1</sup> though the Commonwealth flag is used by the military forces and Government offices. In Canada a proposal in 1925 to devise a distinctive flag was very badly received, and withdrawn by the Government, but in the Union, under the influence in part of the model of the Irish Free State, which at once adopted<sup>2</sup> a distinctive flag, on land, not at sea, it was agreed on 21 July 1925 to withdraw a proposal for a new flag merely in order to allow agreement on its design between the parties, to permit of its formal enactment in 1926. A bitter conflict ensued, the Labour party being gravely divided. It is clear that, as the badges<sup>3</sup> of the Dominions have always had the royal approval, as also in the case of their armorial bearings—often far from beautiful, so any flag designed should have royal sanction. In the absence of special arrangements the one Imperial flag is the Union Jack, which any British subject is at liberty to fly.<sup>4</sup> The royal power to appoint the Imperial flag rests on the Union Act as well as the prerogative.

The use of the royal arms by tradesmen who are favoured with the patronage of Governors is not rare in the Commonwealth and the Australian States, if permission is accorded by the Governor.<sup>5</sup>

<sup>1</sup> See *Debates*, 1908, p. 1791.

<sup>2</sup> Quite informally; Mr. Cosgrave (29 April 1926) declined to consider legislation. Grave unrest was caused in the Union; the Labour party was seriously split, and the Transvaal Nationalists denounced the Bill because it contemplated the use on Imperial anniversaries of the Union Jack also, and thus negated Republicanism.

<sup>3</sup> e. g. Canada's maple leaf was approved by dispatch, 30 April 1870, and New Zealand's fern leaves in 1908; *Canadian Annual Review*, 1910, p. 261; New Zealand, *Parl. Pap.*, 1908, A. 1, p. 17; a Canadian Coat of Arms by Proclamation of 21 Nov. 1921.

<sup>4</sup> Lord Knollys, 29 Dec. 1907, *Canadian Annual Review*, 1908, pp. 584 f.; 1910, pp. 261, 358; *House of Lords Deb.*, 14 July 1908. Canadian governmental offices in the United States and elsewhere use the Union Jack with badge.

<sup>5</sup> The King's permission is requisite for the use of the style 'royal'.

## IMPERIAL LEGISLATION FOR THE DOMINIONS

DESPITE the great extent of the legislative authority of the Dominions there still exist occasions on which legislation affecting them is necessary on the part of the Imperial Parliament, and the right to enact such legislation is expressly asserted in the *Irish Free State Constitution Act*, 1922. It would be idle to determine authoritatively the cases in which the Imperial Parliament can now constitutionally legislate for the Dominions. The large number of Imperial Acts now applicable to them include many which would not be passed in their present form under existing circumstances. It may be suggested that the right constitutionally now extends only to Acts which (a) are beyond the powers of the Dominion to enact, e. g. any vital change in the Constitution of Canada, or probably in the federal character of that of the Commonwealth; (b) are necessitated by existing restrictions on the territorial powers of Dominion legislatures—possibly susceptible of early removal; (c) embody a common scheme on a matter of Empire importance, but are subject to Dominion adoption or adaptation, as in the case of the *Copyright Act*, 1911 and the *British Nationality and Status of Aliens Act*, 1914-22; (d) regulate the control of the army, air force, or navy throughout the Empire; or (e) enforce international obligations or obligations to the Empire where the Dominions refuse to recognize such obligations, a contingency which may be regarded as of minimal probability.

Constitutional legislation has been necessary to give the Dominions their constitutions with but a few exceptions; Newfoundland was given representative government by letters patent, but only after earlier legislation had been repealed to allow of this; Malta and Southern Rhodesia alone now are free from Parliamentary intervention. Imperial Acts have been frequently needed to validate Acts irregularly passed; thus such Acts were essential for South Australia in 1862, 1863, and 1865; in 1901 a batch of New South Wales, Queensland, and Western Australia Acts were validated, and in 1907 a more

general enactment was required. The New Zealand constitution had to be changed in 1857, 1862, and 1868. Legislation was necessary for Canada in 1871, 1875, 1886, 1895, 1907, 1915, and 1916; the Commonwealth would have welcomed it in 1917 if the Senate on party grounds had not refused to concur in asking for an extension of the duration of Parliament in this way. Colonial boundaries are clearly beyond Dominion control, and, doubts having been thrown on the prerogative right to change boundaries, especially if these were defined in an Act, the *Colonial Boundaries Act*, 1895, gave power to the Crown to change, with the assent in the case of the self-governing colonies, as they then stood, and validated *ex post facto* all changes already made; the transfer of territory to Natal from the Transvaal after the war of 1899–1902 was thus made. The Act now applies to the Commonwealth as a unit and to the Union.

Other Acts fall outside the scope of Dominion power; these include the Acts regulating the succession to the throne, the *Regency Act*, 1910, the *Civil List Acts*, the Act to alter the royal declaration on accession, the Acts to change the titles of the Crown. The Act of 1901 regarding the demise of the Crown, providing that no office should thereby be vacated, was expressed to extend to all the Dominions and elsewhere.<sup>1</sup> Moreover, it rests with the Imperial Parliament to regulate the relation of its laws to those of the Dominions, as in the *Colonial Laws Validity Act*, 1865, and to decide its own constitution as by the *Parliament Act*, 1911.

Acts justified both on grounds of uniformity and extra-territorial application include the *Fugitive Offenders Act*, 1881, which is based on earlier legislation and simplifies extradition between the several parts of the Empire; the utility of part ii allowing a simpler procedure by backing of warrants without the formal intervention of the Governor was seen in Australia before federation, and again in 1925 when the whole of the British Dominions in the Pacific were brought under its operation. Section 25 again validates the conveyance of a colonial prisoner between two parts of the colony even outside colonial waters. Part ii allows either of two colonies to exercise jurisdiction in respect of border offences, and penalizes perjury

<sup>1</sup> See 1 Edw. VII, cc. 4, 5, 15; 10 Edw. VII and 1 Geo. V, cc. 26, 28, 29; 39 Vict. c. 10; 17 Geo. V, c. 4; Proclamation, 13 May 1927.

in evidence where it is fabricated or given. The *Colonial Prisoners Removal Acts* of 1869 and 1884 allow of arrangements, generally or in individual cases, for transfers of prisoners, the Secretary of State's approval being requisite in either case. The political side of the matter appeared in the Natal proposals for deportation of Dinizulu and other prisoners during the period 1906-8 ; without Imperial aid legal detention *en route* from Natal or at the place of destination could not be secured. Similarly the *Extradition Acts*, 1870 and 1873, are justified on territorial, uniformity, and international grounds. The Acts, however, may be suspended if local legislation covers the field, or a local procedure Act may be given the force of the Imperial Act. The former method is that of Canada, which provided for extradition without treaty in 1833, and after the Ashburton treaty of 1842 the Canadian wish was respected in the Act of 1843 by allowing the suspension of the Act in favour of colonial legislation, which was duly passed in 1849 for the Province of Canada and in 1868 (c. 94) for the whole Dominion. There was more hesitation after the Act of 1870 was passed, and Canadian Acts of 1873 and 1874 were not accepted ; in 1877, however, an Act (c. 25) amended in 1882 (c. 20) was held adequate, and Orders in Council were duly issued after the consolidation of legislation in 1886 (c. 142) and 1906 (c. 155). The procedure of extradition without treaty is also possible in Canada and is clearly legal ; it may be useful to act on local legislation under the agreement with the United States of 1924 as to extradition for narcotic offences, as the Imperial Act contemplates general treaties, not special treaties affecting one Dominion only. In most parts of the Empire local legislation is confined to detail, and the Imperial Act without local legislation is adequate as held in Newfoundland for all purposes.

Imperial legislation on territorial grounds includes the conferring on colonial Courts of Admiralty jurisdiction, and such enactments as that of 1860 allowing colonial Legislatures, if they wish, to prescribe punishment in a colony for persons wounded within but dying outside, and the Act of 1865 validating marriages contracted in a colony and declared valid by a local Act, provided always that the persons married were capable of intermarriage according to English law.<sup>1</sup>

<sup>1</sup> See also the *Seal Fisheries (North Pacific) Act*, 1912 (2 & 3 Geo. V, c. 10),

Air and shipping legislation for British ships wherever they are is clearly justified on territorial considerations ; the concessions to the Dominions as regards registered and coasting vessels have been discussed above ; the Act of 1894 provides for recognition by the Board of Trade of colonial examinations, and of colonial marked loadlines, which may be given validity throughout the Empire by Order in Council.

The *Army Act* and the *Naval Discipline Act* necessarily extend to the whole Empire, as the Imperial forces could not be permitted to fall under non-Imperial control, if they were stationed in any Dominion. The legal power to send them anywhere in the Empire is unquestioned, but constitutional practice demands that they should not be stationed in the Dominions except by their agreement ; the case is different with the Irish Free State, where the Constitution and the Treaty of Peace contemplate clearly a legal obligation on the Irish Free State to afford defined facilities to the Imperial Government during peace, and much extended facilities in the event of war.<sup>1</sup> The relations of Imperial and Dominion fleets are regulated by the Conference agreement of 1911 and the legislation of that year above referred to. The *Army Act* similarly provides for the control of the Imperial forces throughout the Empire, but permits local legislation to alter minor points such as penalties &c.,<sup>2</sup> while by s. 177<sup>3</sup> it secures the extraterritorial application of local Acts if so provided, but otherwise subjects the colonial forces, if serving with regular forces away from the territory, to the *Army Act*. It is normally arranged that, when serving with Imperial forces outside the Dominion, the *Army Act* is applied in principle.<sup>4</sup> It is

which is only to extend to a Dominion with the assent of the Governor in Council. It regulates matters on the high seas beyond Dominion power of control. The Canadian legislation of 1923 and 1924 to implement the Halibut Fisheries Treaty with the United States is necessarily indirect in its operation.

<sup>1</sup> 13 Geo. V, c. 1, s. 1 ; Art. 7 of Treaty ; Irish Free State Act No. 1 of 1922.

<sup>2</sup> *Army Act*, s. 169. For air forces, see 7 & 8 Geo. V, c. 51.

<sup>3</sup> See also s. 176 (11) ; 2 Geo. V, c. 5.

<sup>4</sup> But in the United Kingdom the *Army Act* rules ; 9 Edw. VII, c. 3. Section 189 of the Act gives the Governor of a Colony where regular troops are serving power to place them on active service, subject to the approval of a Secretary of State. This was done in the Union in August 1914 ; Walker, *Lord de Villiers*, p. 501.

interesting, as evidence of the predominance of Imperial legislation, that it was necessary in the *Naval Discipline Act*, 1922, to enact that every person of the Royal Navy and officer or man of the Royal Marines who is serving with a Dominion naval force shall be subject to the laws governing the Dominion forces, this being necessary to prevent the application of the Imperial Act. In the case of the army, officers may be under both Acts, Imperial and local.

The *Colonial Naval Defence Acts* 1865 and 1909 allow the Crown to accept offers of colonial naval vessels, but this effect is now practically obsolete, and at no time were they applicable to more than a fraction of the Australian flotillas. The naval reserves and volunteer reserves of the Union and Newfoundland are governed by Imperial Acts.

Other Acts are chiefly justified on international grounds, and now local legislation would probably be preferred. Such are the *Foreign Enlistment Act*, 1870, the *Slave Trade Acts*, 1824, 1843, and 1873, the *International Copyright Act*, 1886, the *Mailships Act*, 1891, the *Anglo-French Convention Act*, 1904, and, as late as 1911, the *Geneva Convention Act*. That measure was passed to permit the withdrawal of the reservation made by the United Kingdom regarding the Geneva Convention of 1906, but its passage—interfering as it did with local trade-mark law—without the approval of the Dominions was quite irregular, though power was taken by Order in Council to adapt it to Dominion conditions. The Acts passed after the war to enable the Crown to carry out the treaties of peace with foreign states are couched in general terms, and give power to legislate by Order in Council to carry out the provisions of the treaty, and it was necessary in the *Treaty of Peace Order*, 1919, expressly to exempt from its application the Dominions and India, leaving it to them to legislate locally for the necessary steps to implement the treaties of peace. The *Indemnity Act*, 1920,<sup>1</sup> similarly excluded from its operation the Dominions (s. 7), but this merely disclaims any effort to bar proceedings in Dominion courts ; it clearly bars any proceedings in the United Kingdom in respect of any action wherever done, even though the action is not validated by a Dominion Act of Indemnity. Further, it gave an indemnity for acts done in the territories occupied by

<sup>1</sup> Keith, *War Government of the Dominions*, pp. 268 f.

the Dominion forces during the war, the Imperial Government holding correctly that, whatever might be the power of the Dominions to legislate regarding mandated territory after it was mandated, they could have none before the mandate was conferred, and even then might have no retrospective power.

Other Acts can be explained partly as survivals from an earlier period, partly as due to special causes. The *Official Secrets Acts*, 1889, 1911, and 1920, are justified by the paramount interests of the Empire; provision is made for their suspension by Order in Council if local legislation of adequate nature exists. The *Customs Act* applies only where there is no Dominion legislation and is now inoperative in regard to the Dominions; it was vainly invoked in *Imperial Book Co. v. Black*.<sup>1</sup> The Act of 1853 regarding colonial coinage offences is now obsolescent, as are the old Acts for the punishment of colonial Governors, &c., who misuse their office;<sup>2</sup> those regarding leave of absence to colonial officers concern mainly the Governor in his relation to the Crown.<sup>3</sup> Of great interest is the Act which forbids the issue of *habeas corpus* to any territory where there is a court with power to issue such a writ, thus protecting Dominions from intervention by the English courts, which prior to the Act of 1862—passed at the request of Canada—were compelled to issue the writ even for persons overseas.<sup>4</sup> No longer would Parliament pass such provisions as those of 17 & 18 Vict. c. 80, s. 58, which make certificates of birth available in evidence in the Dominions; old-fashioned also are the Act of 1859<sup>5</sup> regarding the stating of cases by superior courts in the Empire in order to obtain an opinion of courts in other parts as to the law of those parts; the Act of 1859<sup>6</sup> regarding the examination of witnesses by one court in the Empire at the request of another; the Acts of 1856 and 1870<sup>7</sup> applying a similar principle to civil and criminal proceedings (other than political) for foreign courts. In these cases rules

<sup>1</sup> 35 S. C. R. 488.

<sup>2</sup> 11 & 12 Will. III, c. 12; 42 Geo. III, c. 85.

<sup>3</sup> 22 Geo. III, c. 75; 54 Geo. III, c. 61; 57 & 58 Vict. c. 17.

<sup>4</sup> *Ex parte Anderson*, 30 L. J. Q. B. 129; *R. v. Crewe, ex parte Selkome*, [1910] 2 K. B. 576; 25 & 26 Vict. c. 20.

<sup>5</sup> 22 & 23 Vict. c. 63; *Lord v. Colvin*, 29 L. J. Ch. 297. Cf. for foreign countries, 24 & 25 Vict. c. 11.

<sup>6</sup> 22 Vict. c. 20; 48 & 49 Vict. c. 74.

<sup>7</sup> 19 & 20 Vict. c. 113; 33 & 34 Vict. c. 52, s. 24.



of court may be made by the Judges of the High Court, who naturally do not exercise them, but leave the matters to be dealt with by rules of the Dominion courts, under their own powers of rule-making. The *Bankruptcy Act* even in its latest form in 1914 imposes a legal duty on courts in the Empire to be auxiliary to one another, and actually imposes on the Dominions the rule that an English bankruptcy vests property in the Dominions in the official trustee.<sup>1</sup> With this may be contrasted the opposition when the Finance Bill of 1894 was mooted among the High Commissioners and Agents-General, which resulted in the withdrawal of any terms imposing an actual burden on property in the Dominions.

Other Acts deal with matters in the United Kingdom which may depend on matters in the Dominions. Thus the old Act of 1868<sup>2</sup> giving medical practitioners registered in England a right to practise in the Dominions is no longer in force, having given way in 1886<sup>3</sup> and 1905 to legislation allowing recognition of colonial, including Canadian provincial, qualifications on the basis of reciprocity, a system which the Irish Free State proposed in 1925-6 to apply to its doctors, greatly to their indignation, as they were enjoying the advantage of inclusion on the British register and were indifferent to the delights of theoretic autonomy. Similarly colonial probates may be resealed,<sup>4</sup> when reciprocal treatment exists in the Dominions; there are provisions of a similar character as to admission of colonial solicitors,<sup>5</sup> recognition of patents,<sup>6</sup> &c. The *Finance Act*, 1894, made the concession of relief from double death duties where a duty is levied in respect of the death of a person domiciled in England on colonial property, on con-

<sup>1</sup> Cf. 46 & 47 Vict. c. 52, ss. 118, 168; *Callender, Sykes & Co. v. Colonial Secretary of Lagos*, [1891] A. C. 460; *In re Estate Campbell*, [1905] T. S. 28; *In re Insolvent Estate Skeen*, 27 N. L. R. 536, 543; Clark, *Austr. Const. Law*, pp. 298 f.; Dicey and Keith, *Conflict of Laws* (ed. 4), pp. 370 ff. As late as 1925 the *Trustee Act* by re-enactment confers powers in respect of colonial property (*ibid.*, pp. 367 f.).

<sup>2</sup> *Reg. v. College of Physicians and Surgeons of Ontario*, 44 U. C. Q. B. 564; 21 & 22 Vict. c. 90.

<sup>3</sup> 49 & 50 Vict. c. 48; 5 Edw. VII, c. 14.

<sup>4</sup> 55 Vict. c. 6.

<sup>5</sup> 63 & 64 Vict. c. 14; cf. 41 & 42 Vict. c. 33; 49 & 50 Vict. c. 48, ss. 23, 26 (dentists), &c.

<sup>6</sup> See 46 & 47 Vict. c. 57, ss. 103, 104; 7 Edw. VII, c. 29, s. 91; 9 & 10 Geo. V, c. 80; Keith, *Manchester Guardian*, 12 Aug. 1926.

dition of reciprocity, and legislation regulates relief from double income tax, on which a compact was reached in 1926 with the Irish Free State.

Other Acts simply deal with the conditions on which colonial stocks can be made trustee stocks,<sup>1</sup> which is permitted subject to undertakings to keep funds to meet any decrees made in England, and a declaration that any Act varying the security for the loan would properly be disallowed. Or the mode of proving colonial laws in court is specified.<sup>2</sup>

In yet other cases Acts are requisite as parts of a joint business, as in the case of those for the affairs of the Pacific Cable<sup>3</sup> and the administration of Nauru.<sup>4</sup>

Of recent origin is the type of general Act which permits adoption by the Dominions. The case of copyright has already been mentioned ; more important and deserving special treatment is that of nationality.

The Dominions are also affected by certain Acts which penalize misdeeds of British subjects all over the world, e. g. as regards murder, bigamy, explosive substances, and certain cases of perjury, and Dominion British subjects are subject to Imperial legislation as to places where the Crown exercises extraterritorial jurisdiction.<sup>5</sup>

A curious use of the *British Settlements Act*, 1887, remains to be recorded. Under it authority has been given to the Governor-General of New Zealand to make rules and regulations for the peace, order, and good government of the Ross dependency, of which he is also created Governor. The question which inevitably is suggested by this Order in Council of 30 July 1923 is whether the delegation of power is *intra vires*. The Act expressly empowers the Crown in Council to establish 'laws and institutions' (s. 2), and to delegate to three or more persons within the settlement her powers in this regard (s. 3). The obvious conclusion from reading together these sections is that the legislative powers must be exercised either by Order

<sup>1</sup> 40 & 41 Vict. c. 59 ; 55 & 56 Vict. c. 35 ; 63 & 64 Vict. c. 62.

<sup>2</sup> 7 Edw. VII, c. 16.

<sup>3</sup> 1 Edw. VII, c. 31 ; 2 Edw. VII, c. 26, &c. ; Cnd. 2769.

<sup>4</sup> Regulated by legislation in the United Kingdom, the Commonwealth, and New Zealand.

<sup>5</sup> See the Orders in Council for China, Persia, Muscat, Egypt, &c., e. g. the Siam Order in Council, 1926 ; Kuwait Order, s. 8.

in Council or by three or more persons within the settlement, and in point of fact, when I raised a similar point regarding the alleged delegation to the High Commissioner for the Western Pacific by Order in Council to make regulations for territories which were British settlements in the Western Pacific, the argument seems to have been held convincing, for by the *Pacific Islands Regulations (Validation) Act*, 1916, regulations so made were *ex post facto* validated. I remain of opinion that this is the proper interpretation of the Act, and that the power to create institutions does not, in view of the express limitation of s. 3, allow delegation of legislative power save as provided in the Act.<sup>1</sup> The authority of the Governor-General of New Zealand to legislate accordingly appears to me non-existent, and any regulations made by him are probably invalid. The matter may prove of some practical importance, so that further legislation seems desirable.<sup>2</sup>

<sup>1</sup> The power given by *The Union Islands* (No. 2) *Order in Council*, 1925, s. 2, to the Governor-General in Council to delegate legislative power to the Administrator of Western Samoa may be valid if the islands are a colony by cession, not settlement.

<sup>2</sup> The paramount character of Imperial legislation is recognized in *Porter v. The King*, 37 C. L. R. 432, 442, 450, where the validity of the *New Guinea Act*, 1920, is based on the *Treaty of Peace Act*, 1919, and by the Imperial Conference of 1926 (Cmd. 2768, p. 18).

## NATIONALITY, NATURALIZATION, AND ALLEGIANCE

THE power of deciding as to British nationality might have seemed one essentially reserved to the Imperial Parliament, but in point of fact it was early recognized generally in an Act of 1847 that local nationality might be conferred by the authority of colonial Legislatures, and the principle was formally embodied in the *Naturalization Act*, 1870, and still stands in the Act of 1914. The position thus created differed essentially from naturalization in the United Kingdom, which, according to the better opinion, conferred the status of a British subject throughout the Empire, though this was doubted in the Dominions. A person naturalized colonially was not a British subject in the United Kingdom<sup>1</sup>—as many discovered in the war of 1914–19. Abroad he was held to be entitled to the good offices of British diplomats only as a matter of courtesy, which, however, in practice meant nothing disadvantageous. His complaint there was, of course, one common to persons naturalized in the United Kingdom. He might remain a subject of his former country and be reckoned there as not entitled to British protection. In the United Kingdom, however, he might have all civil rights like all other aliens, but he could not exercise the franchise, even if he had been a Minister in his own country like Sir G. Perley in Canada; he was not eligible for the Privy Council or the peerage; he could not enjoy the benefits of the *Wills Act*, 1861, nor the *Foreign Marriage Act*, 1892. On the other hand he was exempt from the penalties imposed by 24 & 25 Vict. c. 100, ss. 9 and 57, on British subjects committing murders or bigamy abroad; from certain sections (686, 687) in the *Merchant Shipping Act*, 1894, the *Perjury Act*, 1911, the *Explosive Substances Act*, 1883, the *Foreign Enlistment Act*, 1870, and the law of treason (35 Hen. VIII, c. 2), or the *Official Secrets Acts*, 1911 and 1920. He was not entitled to the benefit of clauses in extradition treaties entitling a power to refuse to surrender nationals. He was not a British subject in places

<sup>1</sup> *Markwald v. Attorney-General*, [1920] 1 Ch. 348; *R. v. Francis, Ex parte Markwald*, [1918] 1 K. B. 647.

where jurisdiction was exercised under the *Foreign Jurisdiction Act*, 1870,<sup>1</sup> unless he could be held to be a British protected person. Thus normally he would be subject to local jurisdiction, while, if treated as protected, he might in England repudiate the legitimacy of the jurisdiction. There were serious political objections to the status; Sir W. Laurier at the Conference of 1911 pointed out that Americans became good Canadians after naturalization after three years' residence, but they remained aliens in the United Kingdom, and were thus precluded from Imperial sentiment. On the other hand the period of residence required before naturalization by Australia under Act No. 11 of 1903 and by the Union of South Africa was only two years, New Zealand fixed no limit, and Canada alone insisted on three years. There were a certain number of cases in which naturalization was unwisely accorded to persons who sought chiefly respectability and passports, and many South African naturalized persons were ignorant of English. Further, in some cases a colour bar existed.

These considerations rendered impossible the solution urged by Sir W. Laurier that any person naturalized anywhere should have British status throughout the Empire. But it was clearly recognized at the Colonial Conference of 1907<sup>2</sup> that it was absurd that there should be so strict a separation that no amount of residence in a Dominion would enable a man to qualify for British naturalization, since that required five years' residence in the United Kingdom or service of the Crown in foreign parts. The compromise necessary was achieved at the Conference of 1911,<sup>3</sup> which agreed to provide for a system by which there might be uniform Imperial naturalization. The agreement was given effect to in the *British Nationality and Status of Aliens Act*, 1914, since amended in 1918 and 1922.<sup>4</sup> The essence as to naturalization is that it may be conceded by the Secretary of State in the United Kingdom to any person who has been resident in the preceding eight years at least five years in the British Dominions, or been in the service of the Crown, provided the last year of residence must be in the United Kingdom. The applicant must be of good character, know

<sup>1</sup> Amended in 1913 (3 & 4 Geo. V, c. 16).

<sup>2</sup> *Parl. Pap.*, Cd. 3523.

<sup>3</sup> *Ibid.*, Cd. 5745.

<sup>4</sup> 4 & 5 Geo. V, c. 17; 8 & 9 Geo. V, c. 38; 12 & 13 Geo. V, c. 44.

English, and intend to reside in the British Dominions, or serve the Crown. *Mutatis mutandis* the same power is enjoyed by the Government of any British possession, and a person so naturalized is given the full status of a natural-born British subject. But this applies in the case of the Dominions only if the Dominion adopts part ii of the Act of 1914. A minor may be included in his parent's certificate, and a woman who lost nationality by marriage, and whose husband is dead or who is divorced, may be given a certificate without residential qualification. The Act has only slowly been adopted <sup>1</sup> by Canada,<sup>2</sup> the Commonwealth,<sup>3</sup> Newfoundland, but not by New Zealand, and the Union of South Africa only acted in 1926. The Act still binds the Free State pending legislation; it applies automatically to Malta and Southern Rhodesia. Any Dominion may repeal its adherence, but with due respect to acquired rights. In any Dominion where a second official language exists, it may be accepted in lieu of English. Nothing prevents the differential treatment of different classes of British subjects as to immigration or otherwise, a provision intended to calm the fears of those who thought that the new measure might give British naturalized subjects an indefeasible right of entry.

The Act of 1914 is also notable for defining, with Imperial validity and without any saving for the Dominions, the circumstances which go to make up a natural-born British subject. A man is a natural-born British subject if he is born within His Majesty's Dominions and allegiance—this term excluding children of foreign diplomats and alien invaders; even if born outside the Dominions, a man who is the son of a living father being a British subject, is himself a British subject, if his father was (a) born within the allegiance, i. e., on British territory or in a place where extraterritorial jurisdiction is exercised by the Crown; or (b) was naturalized, or (c) became a British subject by reason of annexation of territory, or (d) was serving the Crown when his son was born, or (e) if his own birth is registered at a British

<sup>1</sup> Nothing had been done in 1926 to define the position of the Irish Free State, which can, if it wishes, put itself in the position of a Dominion.

<sup>2</sup> By Acts of 1914, 1920, and 1923, the last of which repealed s. 7 of the Act of 1920 prohibiting naturalization of former enemy aliens without ten years' residence.

<sup>3</sup> The *Nationality Act*, 1920-25; No. 48 of 1920; No. 24 of 1922; No. 10 of 1925.

Consulate within a year after its occurrence. In the last case,<sup>1</sup> which is a special concession introduced to benefit members of English communities in foreign countries, the person concerned must after attaining twenty-one assert his British nationality by a formal instrument and must, if permitted to do so under the local law, disclaim any foreign nationality he may have acquired by birth out of the British Dominions. Further, any person born on board a British ship even in foreign territorial waters is a British subject, but a person born on board a foreign ship is not a British subject merely because he is born in territorial waters.

The Act also without regard to Dominion legislation regulates the nationality of married women by that of their husbands, though permitting a wife whose husband changes his nationality to elect to remain British, and the wife of an alien enemy to resume her nationality as British by birth. Widows do not by the death of their husbands change nationality nor do divorcees; minor children lose nationality with their parents, but a widow's marriage to an alien leaves her British-born children unaffected. British nationality is lost by naturalization while in a foreign country; by declaration of alienage, if the person by birth has a double nationality and is born in the British Dominions, or in any case if born without. The status of aliens is also regulated generally; real and personal property may be acquired, held, and disposed of as by a natural-born British subject, but this provision does not confer any right on an alien to hold real property outside the United Kingdom, or to be the owner of a British ship, or qualify him for office or franchise. He must, however, be tried like a natural-born British subject. The Act saves the power of the Crown to grant letters of denization, or of legislatures to grant local naturalization.

Much of the Act is unalterable by any Dominion, inevitably, as it must lie with the Imperial Parliament to decide who shall be natural-born British subjects, and the fact that local Acts have since repeated the provisions is a matter of legal indifference, and adds nothing to the effect of the Act, however convenient it may be to have all the law contained in one measure. But this ground cannot be pleaded in favour of the

<sup>1</sup> The change was due to war experience, reversing the decision to limit, rather than extend, nationality by descent adopted in the Act of 1914. See the decision of the Imperial Conference of 1921; *Parl. Pap.*, Cmd. 1474, pp. 65-7.

provisions as to aliens which give them the right to hold real and personal property, though there is a limitation to the United Kingdom in the case of land, or require them to be tried in the same way as British subjects. It is true that these sections appeared in the Act of 1870, but it was not there clear, as it is now, that they applied to the Dominions. There is a saving of Dominion legislative authority in s. 26 which may validate any legislation there denying to aliens the same rights as to personal property as are given to British subjects, but the enactment in the Imperial Act is clearly too wide.

In New Zealand the *British Nationality and Status of Aliens (in New Zealand) Act*, 1923,<sup>1</sup> declines to recognize the Imperial Act as binding, and in lieu inserts in a schedule the main portions of parts i and ii of the Imperial Act which are declared to be operative with modifications, involving restrictions on the right of aliens in respect of property, including the express provision that s. 17 of the Imperial Act is not to be regarded as affecting New Zealand enactments restricting trade with enemy nationals. The validity of these modifications is far from obvious, for Sir F. Bell's view that there is any ambiguity in the application of the Imperial Act, except part ii, to the whole Empire is clearly and indisputably wrong. As regards naturalization the Act declares<sup>2</sup> that naturalization in any other part of the Empire confers no rights in New Zealand, a somewhat truculent refusal of reciprocity, and it may be added a rather gratuitous one. Moreover, the Act declines absolutely to limit the discretion of the Minister or the Governor-General in Council to revoke at will any certificate of naturalization, thus departing definitely from the scheme of the British Act, which in certain cases definitely requires a careful inquiry before revocation, thus precluding the operation of the Imperial Act. It may be hoped that wiser counsels will ultimately prevail, as the advantage of uniformity in legislation is clear. New Zealand still clings to a period of three years for her own local naturalization, which cannot be recognized in other parts of the Empire and is manifestly too short.<sup>3</sup>

<sup>1</sup> No. 46 of 1923 ; Sir F. Bell, Leg. Council, 12 July 1923.

<sup>2</sup> s. 3 (3). It was apparently admitted on 18 Sept. 1925 in the Lower House that this went too far.

<sup>3</sup> The New Zealand *Revocation of Naturalization Act*, No. 8 of 1917, though



At the Imperial Conference of 1923 <sup>1</sup> no fundamental problem as to nationality was discussed save the issue whether power should be given to a married woman to keep her own nationality. The Conference did not approve this proposal, but accepted a Commonwealth suggestion in favour of allowing a married woman who is separated from or deserted by her husband to obtain a distinct nationality. It was also agreed that the power of granting Imperial certificates of naturalization should be applied to mandates of ' B ' and ' C ' classes and protectorates.<sup>2</sup>

The general status of British subject is compatible with special connexion with some territory, as shown in the recognized use of the terms Canadian, Australian, New Zealander, South African, Newfoundlander, Maltese, Rhodesian, or Irish, and for certain purposes local connexions have legal effects, though it is true that the English Courts have not yet found it possible to recognize differences of nationality in any sense within the general term British subject. In the case of the Commonwealth the Constitution permits control of immigration, and this has resulted in consideration by the High Court of the sense of that term, with the result that it has been held that even a person born in Australia can be an immigrant. Moreover, it seems that any person who has established a domicile in the Commonwealth is not an immigrant on his return after a temporary absence. In Canada the definition of a Canadian citizen was necessitated by the fact that the Dominion has unfettered power of immigration legislation, and it was desired to decide in which cases deportation of immigrants who became a public charge within three years after entry should be permitted. Accordingly it was enacted in 1910 (c. 27) that any person who had Canadian domicile, or was a Canadian citizen, should have unrestricted right of entry into Canada. A Canadian citizen was defined as a person born in Canada who had not become an alien ; a British subject who had Canadian domicile ; and an alien naturalized under the laws of Canada, who had not become an alien and had not lost Canadian domicile. Canadian

assented to after reservation, was clearly invalid in that it was based on the theory that naturalization under the Imperial Act of 1870 had no binding effect locally.

<sup>1</sup> *Parl. Pap.*, Cmd. 1987 ; Cmd. 1988, pp. 140 ff.

<sup>2</sup> For the decisions of the Conference of 1926, see Part VIII, chap. iii, § 8.

domicile was given artificially to those who had for three years had domicile in Canada, in order to get over the difficulty that in private international law domicile is acquired by mere settlement in Canada with the intention of remaining there. This was modified as regards wives and children never landed in Canada, that they should not obtain Canadian citizenship merely because the husband or parent had attained that citizenship. But citizenship existed only for the purpose of the Immigration Act.

In 1921 (c. 4) Canada made an important change ; under the statute creating the Permanent Court of International Justice each member obtained the right of having indirectly two members of its nationality put forward as candidates for the Court. But two members of the same nationality could not be elected, and it was, therefore, necessary to secure that, if a Canadian nominee should be elected and also a British nominee, both could take their places. For this purpose Canada decided to legislate to define Canadian nationals. The Act provides for the Canadian nationality of (a) any British citizen within the meaning of the *Immigration Act* ; (b) the wife of any such citizen ; (c) any person born out of Canada, whose father was a Canadian national at the time of his birth, or, in the case of any one born before the Act, would have been a national had the Act then been in force. Any Canadian national may, if born in Canada and also a national of the United Kingdom or a Dominion, or if born elsewhere but a Canadian national, if he desires, renounce his nationality by declaration. The new status, of course, has no effect on the character of a Canadian national<sup>1</sup> as above all first a British subject, but it recognizes the measure of distinction within the Empire arising from the position of the Dominion in the League of Nations. Similar provisions were inserted in the South African Nationality and Flag Bill of 1925 and 1926, and in the measure of 1927.

In the case of the Irish Free State the status of citizen is conferred on every person domiciled within the Free State at the time of coming into operation of the Constitution, who was

<sup>1</sup> The provision as to being a national of the United Kingdom, of course, applies to every British subject as matters now stand. The rule might have meaning if the United Kingdom started United Kingdom nationals, which is undesirable.

born in Ireland, or either of whose parents was born there, or who has been ordinarily resident in the Irish Free State for not less than seven years ; but any person who is a citizen of another State may elect not to accept the citizenship, and further rules may be laid down by the Parliament.

Internationally,<sup>1</sup> as has been seen, British subjects are normally but of one class, and enjoy all advantages under treaty which are not essentially local in operation, and the distinction of citizenship is unimportant. But it is probable that it may be developed in use, and one employment of the new conception is obviously suggested by the necessity of extending the extraterritorial powers of Dominion legislatures, which might well be limited in normal use to governing the actions of Dominion citizens or nationals when abroad.

<sup>1</sup> For private international law, see *In re Johnson, Roberts v. Attorney-General*, [1903] 1 Ch. 821 ; *Gibson & Co. v. Gibson*, [1913] 3 K. B. 379. See Dicey and Keith, *Conflict of Laws* (ed. 4), pp. 167 ff., 799 ff.

## THE DOMINION MANDATES

§ 1. *The Mandatory System*

THE Dominions<sup>1</sup> were naturally anxious to obtain in full sovereignty the territories of Germany occupied by them in the war, but President Wilson's intervention resulted in the decision that the mandatory system—which General Smuts had devised for the Turkish Dominions and Austria-Hungary—should be applied to these possessions also. But the objections of the Dominions had the effect of bringing about extensive modifications in the system originally proposed, and as a result there are now recognized three classes of mandates. Those of 'A' type are essentially instances of administrative advice and assistance for parts of the Turkish Empire contemplated in Article XXII of the Covenant of the League, though both the United Kingdom and France have assumed much more authority than these words imply in respect of Iraq, Palestine, Transjordan, and Syria. The second class, 'B' mandates, covers peoples

at such a state that the mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic, and the liquor traffic, and the prevention of the establishment of fortifications or naval and military bases, and of military training of the natives for other than police purposes and the defence of the territory, and will also secure equal opportunities for the trade and commerce of other members of the League.

These terms were originally proposed for the Dominion mandates, but at their instance the position was modified to provide as follows :

There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population or their small size or their remoteness from the centres of civilization, or their geographical contiguity to the territory of the

<sup>1</sup> Keith, *J. C. L.* iv. 71–83 ; *War Government of the Dominions*, pp. 180–95.

mandatory and other circumstances, can be best administered under the laws of the mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

The last phrase might be deemed ambiguous, as freedom of trade might be held to be in the interests of that population, but the Prime Minister of the Commonwealth definitely explained on 10 September 1919 that the mandate would give full freedom save as regards slave trade, arms, liquor, fortifications, and military training ; otherwise there might have been Japanese immigration forming a menace to the Commonwealth. The Labour Opposition was unenthusiastic, as the mandate would cost money. In New Zealand there was equally no joy over Samoa ; it would have been much better, in the popular view, if the islands had been annexed to the Empire and administered by the United Kingdom. In South Africa also there was dissatisfaction, and General Hertzog held that there should have been a referendum to decide the future of the territory. General Smuts objected that it was impossible to adopt this suggestion ; if the Germans had been asked, they would have preferred German rule, then that of the Union ; if the natives they would have preferred Imperial rule—a very fine compliment to the Imperial Government if not so intended.

The terms of the mandates, as finally issued with the approval of the League of Nations, confer on the mandatory full power of administration and legislation over the mandated territory as an integral portion of the Dominion ; the mandatory may apply the Dominion laws to the territory, subject to such local modifications as circumstances may require. The mandatory must promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory. The slave trade must be prohibited and no forced labour is to be permitted, except for essential public works and services, and then only for adequate remuneration. The traffic in arms and ammunition must be controlled in accordance with principles analogous to those laid down in the convention relating to the control of the arms traffic of September 1919. The supply of intoxicating spirits and beverages to the natives is prohibited. The military training of the natives save for purposes of internal police and local defence is prohibited. No

military or naval bases shall be established or fortifications erected in the territory. Subject to any local law for public order and morals, the mandatory must ensure freedom of conscience and free exercise of all forms of worship, and shall allow all missionaries, nationals of any state member of the League, to enter into, and travel and reside in, the territories in the prosecution of their calling. An annual report must be made to the Council of the League to the satisfaction of the Council, containing full information with regard to the territory and indicating the measures taken to carry out the obligations assumed under the articles above set out. The consent of the Council is requisite for the modification of the terms of the mandate, and it is agreed that, if any dispute whatever should arise between the mandatory and another member of the League relating to the interpretation of the application of the provisions of the mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice.

To the terms of these mandates, when they were being approved by the Council on 17 December 1920, the allocation having been made by the principal allied and associated powers in accordance with the Treaty of Peace, Japan presented a formal objection. It was pointed out that under the principles of the Covenant and under its actual terms Japan considered herself entitled to demand the insertion of provisions for equality of trade and commerce in the mandates, but from a conciliatory spirit she consented to their issue without such clauses, reserving, however, the point of view that the rights of her subjects in the mandated territories as enjoyed before the war should be respected. A somewhat similar protest was made by Mr. Sastri in 1921 at the meeting of the League Assembly regarding discrimination by excluding Indians from South-West Africa. It is a fact that both foreign States and other parts of the Empire have suffered loss by the transfer of these territories to the Dominions, for the régime of Germany in many respects was of a more generous and enlightened nature as regards external trade and immigration.

The mode of supervising the carrying out of the mandates was decided by the Council which issued on 1 December 1920 a statement of the constitution of a Permanent Mandates Com-

mission to consider the reports made by the mandatories. This body consists of nine members, a majority representing non-mandatory powers but not officially. The reports are examined by the Commission in the presence of a duly authorized representative of the mandatory power ; it frames its observations for the Council after he has retired, but must submit them for his observations which it must send to the Council, and the Council must publish these observations as well as the Commission's report. Provision is also made for a general meeting of the Commission with representatives of the mandatories for a general discussion. The Commission has no power of control ; it merely advises the Council, and the Council itself has no direct authority, though it could induce a member of the League to force the mandatory to submit its action under the mandate for a decision by the Permanent Court as to its legality. On the other hand, the Council may exercise an advisory influence. Its inability, however, to resist pressure has been seen in the decision in August 1922 to accept the proposal of the Union that the Germans in South-West Africa should be offered the right of becoming practically *en masse* British subjects in the Union. Something perhaps may be allowed for it in the way of publicity, but it can hardly be said that any useful end for the natives of South-West Africa was attained by the investigation desired by the League into the rising of the Bondelzwarts in South-West Africa in 1922.<sup>1</sup> The administration of the Union has been carried on precisely on the lines usual in the Union, and the fact that the Union is under special obligations to the natives has in no way been observed. It is indeed clear that it was out of the question for the Union to treat the natives in the territory better than it did its own natives, and, this being obvious, it must be assumed that the Allied Powers in conferring the mandate on the Union surrendered the right to insist on any serious carrying out of the ' sacred trust ' declared to exist by Article XXII of the League

<sup>1</sup> See an apologia by General Smuts in the Union Assembly, 19 July 1922. Mr. Barlow, in May 1923, after the Report of the Commission, candidly admitted that no effort was being made to carry out the trust committed and that the Union had made ' a damnable mess in German South-West ' (*J. P. E.* iv. 599). Even in 1926 all that could be claimed was that the tribe was submissive in sullen resentment. See also Emmett, *J. C. L.* ix. 120 f.

Covenant. The permission given to the Union<sup>1</sup> by the *South-West Africa Naturalization of Aliens Act*, 1924, to turn all German subjects who did not object into British subjects in the Union meant definitely the reassertion of the doctrine of Germany that the territory exists for European exploitation of the natives. There is more hope for the natives in Samoa and New Guinea, for neither territory offers room for white settlement of the type in South-West Africa, and from both lands the removal of the German population has been in the main carried out. In the case of Nauru the fact that the British Empire appropriated the valuable phosphate deposits was a source of much comment in League circles, but it was justly pointed out that the phosphates were being exploited legally under a German authority by the Pacific Phosphate Co., which was bought out by the Governments of the United Kingdom, Australia, and New Zealand for £3,500,000, the sums being contributed in proportions of 42, 42, and 16 per cent. There remains, however, the grave difficulty that the Governments are vitally interested in the export of phosphate and that this interest cuts across the protection of the natives. The objection is in practice mitigated by the fact that the people draw considerable revenues from the exploitation of the phosphate, which give them adequate comfort at present.

The Empire showed its unity in its action in November 1926 in sending a collective reply, for New Zealand, for Australia, and South Africa, as the outcome of discussions at the Imperial Conference, to the League of Nations on the subject of the questionnaire of the Mandates Commission. It was felt by the Governments that the questions were too detailed, and that in addition there was the strongest objection to the proposal of the Commission to receive evidence from petitioners who alleged the existence of unsatisfactory conditions in the mandated territories. It is easy to understand that fear of German claims for the return of New Guinea and dislike to agree to inquiry into the management of the natives in South Africa motivated the Dominion Governments, but the fact remains that the Commission seems to have been well within its rights in its proposal, and that the error, if any, of the Empire Governments was in agreeing to the mandates system in lieu of insisting on

<sup>1</sup> Cf. *B. Y. B. I. L.*, 1925, pp. 188-91.



the complete annexation, into which the Dominions are in effect seeking to turn their mandates. The Commission, of course, cannot be expected artificially to limit its duties, because these inquiries reveal defects in the management of the mandatory States.<sup>1</sup>

### § 2. *The Commonwealth Mandate*

The German possessions in the Pacific other than Samoa and those north of the Equator—which Japan occupied and later received in mandate—were occupied by the Australian Government on 17 September 1914, and ruled under martial law until May 1921. The allied and associated powers agreed in 1919 that the islands should be mandated to the Crown for and on behalf of the Government of the Commonwealth, and a Commission was appointed to consider the mode of administration, finally deciding against the suggestion of treating the territory as subordinate to Papua. There was no legal difficulty as to legislation, for the Commonwealth has full authority to legislate for any territory placed under the authority of the Commonwealth by the Crown or otherwise acquired by the Commonwealth. The *New Guinea Act*, 1920, forms the whole of the territories into one administration of New Guinea, authorizes the Governor-General to accept the mandate, and to appoint an Administrator to exercise the executive power of the Commonwealth. Officers may be appointed by the Governor-General or by delegation by the Minister or the Administrator. Legislation<sup>2</sup> is by the Governor-General by Ordinance, which must be laid before Parliament within fourteen days, and may be disallowed by either House by resolution on notice given within fifteen days after laying. By statute the privileges secured to natives by the mandate are laid down, and the Act

<sup>1</sup> The Imperial Conference of 1926 agreed that treaties adopted by the Dominions should be assumed to cover mandated territories unless excepted. The British usage treats them as if protectorates or Crown Colonies.

<sup>2</sup> As is made clear in the amending Act of 1926, the power of the Governor-General is extended to making Ordinances having the force of law 'in and in relation to' the territory, not merely 'in the territory', and the period for laying before Parliament is placed at thirty days. The Administrator is also given power to do official acts when outside the territory, e. g. on his visits to the Commonwealth. Acts of 1926 provide bounties and customs preferences for both New Guinea and Papua.

goes further in forbidding all forced labour, thus evading serious disadvantage. Commonwealth Acts do not apply to the territory save if expressly made applicable by the Act or by ordinance. By the *Laws Repeal and Adopting Ordinance*, 1921, German law was swept away, and in lieu statutes and the principles of the English common law and equity were introduced, subject to modification by ordinance. The Ordinance further assured the natives of their existing land rights, and their rights as to cultivation, barter, hunting, and fishing, and provided that tribal institutions, customs, and usages should continue so long as not repugnant to humanity or express enactment, and an Ordinance of 1924 makes wise and suitable provisions for securing the due observance of native usage with respect for the rights of superior education. The land of the territory, formerly owned by German companies and private persons, was expropriated under the terms of the Treaty of Peace in 1920 and 1925 ; sale of it has been sanctioned, but normally land, where not in native ownership, is offered only on leasehold tenure. Educative and health efforts for native benefit are undertaken.

### § 3. *The New Zealand Mandate*

The mandate for Western Samoa presented more difficulties to New Zealand, which had been in occupation since 29 August 1914 under martial law. An Act of 1919 was passed to enable the mandate to be accepted from the League of Nations and to authorize the issue of Orders in Council for the government of the island. There being no clear authority thus to legislate, it was decided to obtain an Imperial Order in Council of 11 March 1920 issued under the *Foreign Jurisdiction Act*, 1890, and any other prerogative powers authorizing New Zealand to legislate for Samoa. This was carried out in detail by the Samoa Constitution Order, 1920, but this was replaced by the *Samoa Act*, 1921. By this measure the government of Western Samoa is vested in the King as if it were part of his Dominions. The executive control is vested in an Administrator, appointed by the Governor-General and acting under the control of the Minister for External Affairs. A Samoan Treasury is provided for, and departments of education and public health and a public service. Legislative authority is given to the Governor-

General in Council, but also subject to the Act itself, any other New Zealand or Imperial Act or regulations, to the Administrator with a Legislative Council, which under the amending Act No. 24 of 1923 consists of six official members and not more than that number of unofficials, of whom three are elected by European residents and two by Samoans. Ordinances require the Administrator's assent, and may be disallowed in whole or part within a year by the Governor-General. No Ordinance may affect the prerogative of the Crown or the title of the Crown to land ; impose customs or export duties ; establish any body corporate or any municipal government, save by the Act of 1923 at Apia ; establish paper currency ; or impose a penalty of more than one year's imprisonment and £100 fine, or, for a company, £500. Neither the Council nor the Executive may establish any military or naval base or fortifications in Samoa ; provide for the military training of the natives save for public purposes, or borrow money save from the New Zealand Treasury. Further, the Act of 1923 empowered the Administrator to appoint Faipules, native chiefs, but restricted his choice to those eligible by native law for the position, and directed the calling of a Fone of Faipules, as an advisory council meeting twice a year to discuss on its own initiative or on reference by the Administrator matters of native interest. The Act of 1921 creates a High Court with a Chief Judge and authorizes the appointment of other judges and commissioners if necessary and native judges with jurisdiction over Samoans only, and no power to impose sentences of imprisonment. The High Court has full jurisdiction in Samoa, and its judgements may be executed by the Supreme Court of New Zealand. That Court has full civil jurisdiction over Samoa and criminal jurisdiction over persons guilty of offences in Samoa who are present in the Dominion. Moreover, it decides on cases stated by the High Court and on appeal in these cases finally. The High Court may enforce judgements of the Supreme and Magistrates' Courts in New Zealand. An elaborate code of criminal law and criminal procedure and the rules of evidence are enacted, and provision made for suits by and against the Crown. Marriage, divorce, the treatment of persons of unsound mind, and the care of roads are provided for. The manufacture, importation, and sale of liquor are prohibited, as is the giving of liquor to a native

save under medical prescription, and the Administrator alone may import liquor for use for medical, sacramental, and industrial ends ; the penalties in these matters were enhanced in 1923 at the request of the natives. Land is classed as Crown land, vested in the Crown free from native title or any estate in fee simple ; European land held from the Crown in fee simple and native land, vested in the Crown but held by the natives by native title, that is, in accordance with the customs and usage of the Samoan race. But a title to native land cannot be asserted against the Crown save in so far as investigation of native title is provided for by regulation or ordinance. English law, as it was introduced into New Zealand on its becoming a Colony on 14 January 1840, is applied to Samoa, with various modifications ; certain Acts are specifically applied, and in native cases Samoan laws of succession are to be followed. Contracts by Samoans are not to be enforced if held by the High Court to be unreasonable, oppressive, or improvident.

The property of the German Government in Samoa was taken over by the New Zealand Government ; this gave it possession of a sixth of the land, but involved it in the difficult problem of importing or otherwise securing labour to work the coco-nut plantations, for which Chinese had been brought in under the German régime. The difficulty involved moral considerations ; to bring in unmarried Chinese meant risk of illegal unions with Samoans—these being prohibited by the Act of 1921, while women introduced with the Chinese frequently turned out not to be their legal wives. Some importation, however, was necessary, while efforts were being made to secure Polynesian labour in lieu.<sup>1</sup> New Zealand aids the finances by a grant in aid of the additional medical and educational expenditure since the mandate was exercised, and has given £125,000—£25,000 as a donation, and the rest at 5 per cent., for public works.<sup>2</sup>

<sup>1</sup> On 31 Dec. 1925, besides 2,498 Europeans (446 pure) there were 36,688 Samoans, 155 Solomon Islanders, 890 Chinese working under free labour conditions but denied the right to settle. See *Parl. Pap.*, 1926, A. 4.

<sup>2</sup> Samoan appreciation was shown on 24 Dec. 1925, when certain sacred and historic emblems of the ancient kingship and government of Samoa were at the request of the Faipules entrusted to New Zealand. The doctrine of trusteeship was asserted unreservedly by the Governor-General on his visit to the islands in 1926.

#### § 4. *The Union Mandate*

Far more complex problems have faced the Union. South-West Africa, after a severe campaign interrupted by the rebellion, fell definitely into her hands on 9 July 1915, and thereafter was governed under martial law until 1920. The *Treaty of Peace Act* of 1919 gave power to the Governor-General in Council to legislate for South-West Africa and to delegate legislative power to an Administrator. The authority so to legislate was held by the Government, supported by the Speaker, to arise from the mandate to be conferred and from the right of the Union to legislate for the peace, order, and good government of South Africa, which necessitated regulating matters outside the Union. It was provided that native reserves should not be alienated without Parliamentary sanction, and that the Governor-General might apply to the territory the Union *Land Settlement Acts* of 1912 and 1917, and the Transvaal *Crown Land Disposal Ordinances*, 1903 and 1906, under which *inter alia* land might be granted in individual title to natives or coloured persons. It was also enacted that no State lands or waters should be granted or concessions conferred without the approval of Parliament. This was followed, before the mandate was conferred, by the *Administration of Justice Proclamation*, 1919, under which from 1 January Roman Dutch Law was introduced, a High Court of a single judge with civil and criminal jurisdiction, the latter exercised with two advocates or magistrates, and Magistrates' Courts with civil and criminal jurisdiction, subject to appeal to the High Court, while from the High Court appeals lie to the Appellate Division of the Supreme Court of the Union. In addition to Roman Dutch law there are in force in the Union Union Acts ; proclamations by the Administrator which have introduced various other Union Acts ; and portions of German law, e. g. as to mining, specially preserved, by reason of not conflicting with any other sources of law.

The aim of the administration from the first was to enforce a strict but humane rule on the natives, and to conciliate the German population of settlers, as opposed to soldiers and undesirables who were sent to Germany, and to win it over to accepting as its destiny incorporation in the Union. The former end has been achieved by the passing of a number of measures

calculated to enforce much of the old German system of exploitation of the natives. The *Native Administration Proclamation* of 1922 enforces a strict system of passes to restrict and regulate the movements of the natives ; it also allows for the creation of native reserves and for the supervision of natives resident there and on farms ; the masters' and servants' laws of the Cape are also applied to regulate relations between workers and employers. The pass laws are not applied in purely native areas such as Ovamboland and the Rehoboth district, and exemptions may be granted in approved cases. The old rule of the German administration that natives must work—morally indefensible in any country which imposes no obligation on white people and supports them in idleness by doles—is enforced by the *Vagrancy Proclamation*, though efforts are made to secure that the native has some selection of employer—often nominal ; natives who possess visible means of support may be exempted, but it is to the interest of the employers and the administration that they should not be. The *Municipal Proclamation* authorizes municipalities, which were revived after temporary suppression in 1920, to regulate the control of natives on locations. Fortunately, the old reserves allotted to the natives by the Germans have been respected, and new reserves have been allocated to the extent of 6,177,150 acres—a miserable amount compared to the enormous areas claimed as Government land ; it is hoped thus to produce a contented population and to create a source of labour supply, in accordance with the efforts made in the Union to establish natives on inadequate reserves, so that they may be compelled to work for Europeans. The melancholy episode of the Bondelzwarts rising, induced by bad management and unfair treatment, and repressed with needless brutality, has been noted, as well as the impotence of the League to do anything to improve the lot of those who are the alleged objects of a ' sacred trust '.

Very different has been the treatment of the German settlers. General Smuts was firm in their regard on one issue only, the necessity of their accepting merger in the Union as their ultimate fate, while they meditated distinct existence with an ultimate autonomy, and the preservation of their speech and institutions, urging with justice that to substitute a quaint system like Roman Dutch law for the fine structure of German

civil law was a reversion to barbarism. The first success in meeting their views was the decision to associate under Proclamation No. 1 of 1921 an Advisory Council with the Administrator, and some success was secured in regard to the handing over of the German schools, thirteen of which were handed over on 1 January 1922, the use of German being permitted as the medium of instruction in elementary education; from Standard I one Union language is also studied, and from Standard VI it becomes the medium of instruction. Further negotiations resulted in the Union Government persuading the Mandates Commission to approve of the idea of the naturalization of the Germans in the territory, and in 1923 General Smuts arranged conditions with the German Government.<sup>1</sup> The procedure was in a sense odd, but it was justified by the fact that the German Government was to exercise its influence with the Germans in the territory so that they might choose British nationality. The essence of the settlement was an undertaking that the German inhabitants would not be asked for thirty years to fight against Germany in case of war, and would be aided in education facilities, and the use of German would be permitted in communications with the Government. As a result, the vast mass of Germans in the territory accepted the Act, No. 30 of 1924, which made them British subjects unless they chose to disclaim that position.

In 1925 General Hertzog's administration passed a measure of great importance, establishing a quasi-autonomous administration on provincial lines as a preparatory step to incorporation in the Union, which is clearly the aim of the Union and which the Council of the League will have to sanction. Under it the Administrator, an office conferred in 1926 on a strong supporter of General Hertzog, who claimed that he must have such a person in this office, is to act with an Executive Committee of four members elected by the Assembly, which has been constituted under the Act, on the system of proportional voting. This body, as in the provinces, decides by majority of votes with a casting vote to the Administrator. It has also executive power in respect to matters on which the Assembly can make ordinances. The Legislature consists of eighteen members, six nominated by the Administrator subject to the approval of the

<sup>1</sup> See Memorandum, 23 Oct. 1923; *Parl. Pap.*, Cmd. 2220.

Governor-General, twelve elected in twelve electoral divisions by European males aged twenty-one and twelve months resident. A member must be enrolled as a voter, and must not have been convicted of crime for which he has been punished by imprisonment, unless he has received a pardon or five years have elapsed since the end of his sentence, nor be an unrehabilitated insolvent or of unsound mind. Seats are vacated by resignation, by failure to attend for a session without leave, and by loss of qualification, and in the case of a nominated member by revocation of nomination with the assent of the Governor-General. The Legislature chooses its own chairman, who has only a casting vote, but any member of the Executive Committee may address it, but not vote. It has a duration of three years, subject to dissolution for special cause by the Governor-General, and a session must take place once a year. Its powers to make ordinances are restricted by the necessity of special permission in advance from the Governor-General in any case of legislation affecting lands and matters as to natives, including native taxation; mines, minerals, mineral oils, and precious stones; railways and harbours and the staffs employed on them; the public service; the constitution, jurisdiction, and procedure of courts of justice; postal, telegraph, and telephone services; military organization; the South African Defence forces; immigration; customs and excise and currency and banking. There are also temporarily reserved for three years the subjects of police force; civil aviation; education in state-aided schools; land and agricultural banks and Government lands. These matters may be transferred by proclamation after three years on the request of two-thirds at least of the Assembly. Bills must be assented to, or reserved by, the Administrator; they may be disallowed by the Governor-General, reserved for further consideration, but must be assented to within one year or become null and void. The official languages are English and Dutch, but German may be used in the Assembly. There is formed a Territory Revenue Fund, which can normally only be appropriated by law, but on the refusal of the Assembly to grant sufficient appropriations or impose taxes necessary for carrying on the administration, the Governor-General may authorize the expenditure or impose the tax. The High Court alone has jurisdiction to consider any question as to the validity



of an ordinance, which must be treated as valid in Magistrates' Courts. Walvis Bay has been since 1922 included in the territory for all purposes of administration and legislation, and this is continued by the Act, which, however, excludes the Caprivi Zipfel. But the Government and Parliament of the Union retain full powers of administration and legislation, and proclamations by the Governor-General or by the Administrator under delegation may override ordinances at any time. A further power is given to the Governor-General after three years from the first meeting of the Assembly under the Act to alter any parts of the Act save ss. 26 and 44. The Assembly may recommend the passing of measures which are beyond its powers, and advise the Administrator on any matter referred to it by him. Further, in order to guide the Administrator on those matters which are not within the sphere of the Executive Committee and the Assembly, and on his assent to or reservation of ordinances or any other matters which he may refer to it, there is created an Advisory Council consisting of the Administrator, three persons nominated by him, of whom one must be chosen by reason of his knowledge of the reasonable wants and wishes of the non-European races of the territory, and the remaining members of the Executive Committee. This body, like the Committee, holds office from its appointment after the meeting of the Assembly to the next Assembly. It is noteworthy that no provision whatever is made for representation of native interests on the Assembly, which may at any time be authorized by the Governor-General to deal with native issues.<sup>1</sup>

The railways and harbours are under the Railway and Harbour Board of the Union, which is enjoined by the Act to consult with the Administrator or his nominee on matters affecting the territory. The customs is managed by the Union, which since 1919 pays over to the administration the amount due. The rich diamond fields, which yield the Government 66 per cent. of the gross profits, less 70 per cent. of the working expenses, afford a substantial source of wealth. Land is disposed of to Europeans under the Union Acts of 1912-20.

<sup>1</sup> On the legal position of the mandatory, cf. *R. v. Christian*, [1923] A. D. 101.

§ 5. *The British Empire Mandate for Nauru*

This is the most curious of all the mandates, for it was granted simply to His Britannic Majesty, and the meaning of this phrase was settled by agreement between the United Kingdom, Australia, and New Zealand to be these three Governments, the other parts of the Empire disinteresting themselves. The aim of the Governments was to obtain control of the phosphate deposits then worked by a British company, and for this end it was agreed to buy out the company, and to work the phosphates by means of a body of three appointed one by each Government, the output to be allotted to the Governments in the proportion of their shares in the purchase price, any amount not taken by the United Kingdom to be shared proportionately between Australia and New Zealand. The British view of the situation as explained in 1919 was that it acted as mediator between the two Dominions. The agreement was presented for approval by the three Parliaments and met with hostile reception in the United Kingdom, where the obvious objections were taken by a public, not yet disillusioned, that the plan violated the principle of the 'open door' and the maxim of trusteeship. Lord Milner proved obstinate, holding that the agreement was perfectly valid, though he was compelled to accept the amendment which confirmed the agreement subject to Article XXII of the Covenant of the League. He adopted, however, the characteristic and utterly untenable position of declaring that the Council had no right to have the terms of the mandate submitted, arguing that the powers of the Council arose only if the terms of a mandate had not been agreed on by the members of the League, by which he asserted the members concerned, not the Assembly, were meant. In point of fact this attitude was not persisted in, and a mandate was duly issued in the usual form by the approval of the Council. The administration was entrusted<sup>1</sup> for ten years to an Administrator appointed by the Australian Government, who took up office in June 1921, the island having hitherto been under an Imperial officer since 1915. He possesses full administrative, legislative, and judicial powers, insufficient care having been taken in the Commonwealth to secure due subordination to the Governor-General by

<sup>1</sup> Without approval by the League of Nations.

law.<sup>1</sup> He is advised by an Advisory Council of two nominated Europeans and two chiefs elected by the natives. Something has been done for education, which is compulsory between ages six and sixteen, and for health, while intoxicating liquor and deleterious drugs are forbidden to the natives. The essential feature of the position is the working of the phosphate for the benefit of Australia and New Zealand with repayment of the purchase money with interest at 6 per cent. in fifty years. The price is managed to benefit as far as possible the purchasers in the two Dominions. The workers are some 60 Europeans, under 850 Chinese, and a handful of South Sea Islanders. The people of Nauru, about 1,200, care little for work. Up to 1 July 1921 they received the miserable royalty of  $\frac{1}{2}d.$  on all phosphate exported; their protests resulted in its increase to  $2d.$  a ton and £20 an acre for land taken up after 30 June 1921, while  $1d.$  a ton is paid to the administration for the benefit of the people. The island contains only some 1,400 acres of coco-nut lands, and 4,250 acres of phosphate-bearing lands, so that care ought to be taken to secure the natives sufficient resources to provide other abodes for them when in due course the island is rendered uninhabitable for the larger number, as the working of phosphate leaves nothing that can be used.

It is impossible not to feel that there is much force in the view of the Mandates Commission of the League expressed in 1922, when it called attention to the fact that the importation of Chinese was not likely in the conditions in which they lived to further their moral well-being, and that the Governments had placed themselves in an embarrassing position by having to administer a system under which the due exercise of their duty of furthering the moral and material well-being of the natives might well run directly counter to the desire to make the concern a profitable one to the users of phosphate in the Dominions.

<sup>1</sup> But he does not control the body entrusted with the working of the deposits, and this point has been criticized.

⌘

PART VI

THE JUDICIARY

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## THE TENURE AND NATURE OF JUDICIAL OFFICE

§ 1. *Judicial Tenure*

BEFORE self-government was accorded, colonial judges were, as a rule, adequately protected from capricious control by the executive. They might be removed under Burke's Act<sup>1</sup> by the Governor in Council, but from such removal an appeal lay to the Privy Council. The practice had also grown up of the Crown removing on addresses from the Legislature, in imitation of British usage, but in this case also the Crown would normally consult the Privy Council before acting.<sup>2</sup> At the introduction of responsible government into Canada no further change was made save for the placing of the judges' salaries in the Civil List of the Act of 1840, and similar provision was made in Nova Scotia, New Brunswick, and Prince Edward Island, when responsible government was granted. The regulation of judicial tenure by Nova Scotia in 1848 (c. 21) authorized removal on an address from the Legislature, but subject to an appeal to the Privy Council, while Canada also regulated tenure by two Acts of 1843 and 1849. The local Acts, however, were superseded as regards judges of superior Courts in Canada by s. 99 of the *British North America Act*, 1867, which provides that the judges of the superior Courts shall hold office during good behaviour, but may be removed by the Governor-General on address from the Senate and House of Commons. As regards judges of the Supreme Court of Canada itself, their position is made the same by Dominion legislation,<sup>3</sup> which likewise vests their appointment in the Governor-General in Council. Further Dominion legislation gives judges of County Courts tenure during good behaviour, but subject to removal by the Governor-General in Council on the ground of misbehaviour, or inability, or incapacity to perform the duties of the post by reason of old age, ill health, or other cause. In the case of Supreme Court

<sup>1</sup> 22 Geo. III, c. 75.

<sup>2</sup> *Representatives of the Island of Grenada v. Sanderson*, 6 Moo. P. C. 38. These petitions were fit for reference to the Privy Council under 3 & 4 Will. IV, c. 41, s. 4.

<sup>3</sup> Age limit, 75, fixed in 1927.

and County Court judges it seems that Burke's Act may in theory still be applicable, which is hardly the case with judges of superior Courts, as the Imperial Act so definitely regulates the mode of their removal. Attempts have been made in Canada in the cases of Lafontaine and Loranger to obtain removal of judges of Quebec,<sup>1</sup> but in neither case did the Committee of the House of Commons, which was appointed, decide that action was proper ; in the case of Wood C.J. of Manitoba in 1882<sup>2</sup> even a committee was refused. Removal of County Court judges is naturally less rare. The question of imposing an age limit on judges of superior Courts has been mooted, but a change in the *British North America Act* would be requisite, and the demand for the alteration has not yet been sufficiently effective to produce the necessary Imperial Act. The end desired is in part met by an Act of 1922 (c. 29) providing for cessation of pay on a finding of incapacity by the Governor in Council on a report from the Minister of Justice after inquiry by a commission ; this clever device compels resignation, and is legal, as the Imperial Act does not regulate salaries.

In Newfoundland the tenure of office was regulated by the Charter of Justice granted by the Crown in 1825, under which judges were appointed by the Crown and removed by the same authority. It is clear that the Crown could act on an address : Boulton J. was removed on an address from the Assembly under representative government, he being a member of the Council. Burke's Act would also have applied. Removal by the Crown on address from the two Houses is prescribed by Act of 1904 (c. 3), but this, of course, cannot exclude the operation of Burke's Act.

In New South Wales on the concession of responsible government the definite rule<sup>3</sup> was laid down that a judge should hold office during good behaviour, subject to removal by the Crown on an address from both Houses of the Legislature, and that his salary should not be diminished during his tenure of office. By Act No. 9 of 1918 retirement was made compulsory for all

<sup>1</sup> *Commons Journals*, 1867-8, pp. 297, 344, 398 ; 1869, pp. 135, 247 ; 1877, pp. 20, 25, 36, 132, 141, 158, App. No. 3.

<sup>2</sup> *Ibid.*, 1882, pp. 176, 192, 355 ; *Sess. Pap.*, No. 106.

<sup>3</sup> 18 & 19 Vict. c. 54, sched. ss. 38-40 ; Act No. 35 of 1900, ss. 10, 11.

judges, even those serving, over age seventy on full pension. The same provisions were applied to Queensland in 1859 in the letters patent, under Order in Council authorized by Imperial Act and confirmed by another Act.<sup>1</sup> In Western Australia they were enacted in the Imperial Act of 1890<sup>2</sup> deciding the form of constitution. In these cases it may be held that, in view of the one definite mode of removal provided and the analogy of the United Kingdom, Burke's Act may be deemed to have no application. That Act was passed to secure that holders of patent offices should exercise their offices and not stay in England, leaving ill-paid deputies to perform their functions, and, therefore, the power to remove was given, but subject to appeal to the Privy Council, for a patent office was a quasi freehold whence a man might not lightly be dispossessed. It has never been judicially decided whether the Act refers only to office under the Great Seal of England, as in *Montagu v. Lieutenant-Governor of Van Diemen's Land*,<sup>3</sup> or to offices under the local Great Seals, as in *Willis v. Sir George Gipps*,<sup>4</sup> but it has been ruled, in *Ex parte Robertson*,<sup>5</sup> that it applies only to offices held during good behaviour, that is to judges, civil service commissioners, railway commissioners, and other high officers. It may be admitted that the mode of removal must be reckoned an alternative to that of removal on addresses, but the better opinion seems to be that the new method was intended to exclude the old. In the case of South Australia, however, where a fourth judge was added by Act No. 1358, and the power to remove on address from the Houses is merely given by local Act, No. 2 of 1855-6 (ss. 30, 31), the right to act under Burke's Act is incontestable. It may be that it is so also in Victoria,<sup>6</sup> though the fact that the Imperial Act gives the power to remove on an address to the Governor suggests that this was intended definitely to negative the application of the old Act. Further, it appears that the Constitution Act of Victoria must not be deemed to have removed the older Act, 15 Vict. No. 10, s. 5, under which the Governor in Council can suspend a judge; on the ruling of the local law officers and the Imperial law officers it was held that this Act must be deemed to be still applicable,

<sup>1</sup> See 31 Vict. No. 38, ss. 4, 16, 17.      <sup>2</sup> 53 & 54 Vict. c. 26, sched. ss. 54-6.

<sup>3</sup> 6 Moo. P. C. 489.

<sup>4</sup> 5 Moo. P. C. 379.

<sup>5</sup> 11 Moo. P. C. 288.

<sup>6</sup> 18 & 19 Vict. c. 55, sched. ss. 38, 39.



and it was included in the *Supreme Court Act*, 1890 (s. 13). The existence of the power served Mr. Higinbotham well in his feud with Sir R. Barry C.J., who declined to correspond with him, asserting the right to write direct to the Governor, for its existence<sup>1</sup> cowed the judge into accepting his obligation to communicate with the head of the law department.

The Victorian power to suspend was a relic of the old practice under which, besides the power of amotion under Burke's Act, the Governor could suspend, leaving it to the Secretary of State to take the wishes of the King. To limit both these powers was the aim of the first Tasmanian Act, after responsible government was conceded, 20 Vict. No. 7, when it was expressly provided, in order to secure the position of the judges, that neither suspension with or without the assent of the Executive Council, nor amotion with such assent, should be lawful, save on an address from both Houses. Legally this could not vary Burke's Act, but it did bar the old right of suspension which rested on nothing more than the royal instructions. Further, the mode of appointment of judges, which was vested by 9 Geo. IV, c. 83, in the King, was transferred under the authority of s. 5 of the *Colonial Laws Validity Act*, 1865, by Act 50 Vict. No. 36, s. 5, to the Governor in Council.

On the formation of the Commonwealth<sup>2</sup> a definite step forward was taken by enacting that judges of the Supreme Court, who were to be appointed by the Governor-General in Council, 'shall not be removed except by the Governor-General in Council on an address from both Houses of Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity', while their salaries were not to be diminished during their tenure of office. It is clear now for the first time that amotion is impossible, and for the first time there appears the necessity of the address alleging that misbehaviour or incapacity has been proved, though it remains for the Legislature to say what to it seems to be proved.

<sup>1</sup> Morris, *Memoir*, pp. 112-16; Forsyth, *Cases and Opinions on Const. Law*, pp. 78 ff. Contrast the view of the law officers in a Queensland case, Quick and Garran, *Const. of Commonwealth*, p. 733. On the whole subject, see Sir F. Rogers's memo., *Parl. Pap.*, C. 139; case of Onslow C.J., Western Australia, Battye, pp. 348 ff.

<sup>2</sup> 63 & 64 Vict. c. 12, Const. s. 72. See the *Judiciary Act*, 1903, amended up to 1926.

It has been judicially held in a Queensland case<sup>1</sup> that income tax on a judge's salary is not contrary to the constitution, for that does not mean that a salary is to be exempt from normal taxation. Moreover, both New South Wales and Queensland have decided that judges must retire at age seventy, contrary to the usual rule which makes the offices *ad vitam aut culpam*; the Queensland Act of 1921, No. 14, gives no pension, destroying judicial independence. Further, it has been definitely laid down by the Privy Council<sup>2</sup> that it is possible for Queensland to appoint a judge of the Supreme Court with a limited period of office, though subject when in that office to the rule of good behaviour, however much such appointments may be open to objection as diminishing the impartiality and independence of the bench.<sup>3</sup> The legislation, however, of Queensland is distinctly in the direction of diminishing the position of the judiciary, as was shown in 1925 when a railway strike forced it to declare by legislation a higher minimum wage than that laid down by the Arbitration Court established for the express purpose of reaching decisions on evidence, and not under pressure of strike threats, which the Government was too cowardly to resist.

In New Zealand no provision was made as to judicial tenure in the Act of 1852, but the civil list (s. 65) provided salaries for a Chief Justice and a puisne judge. In 1857 a temporary appointment of a puisne judge was made, though there was no vacancy, and in 1858 an Act was passed to regulate appointment, which was to be by the Governor in the name of the Crown, while removal of judges, who were to hold during good behaviour, was to be by the Governor on address from both Houses; another Act provided judicial salaries, while s. 6 of the first Act provided that the salary of a judge should not be diminished while in office.<sup>4</sup> These principles were maintained in Act No. 29

<sup>1</sup> *Cooper v. Commissioner of Income Tax for Queensland*, 4 C. L. R. 1304; cf. *Abbott v. City of St. John*, 40 S. C. R. 597.

<sup>2</sup> *McCawley v. R.*, [1920] A. C. 691.

<sup>3</sup> To prevent this, while the power to appoint is given generally in New South Wales Act No. 9 of 1912, both Houses of Parliament must concur in adding beyond seven puisne judges. An age limit cannot be made in the Commonwealth, but in 1926 pensions were given to encourage retirement; *Debates*, pp. 2238 ff. Victoria, Tasmania, Western Australia have pensions.

<sup>4</sup> The commissions of judges were not to determine on the demise of the

of 1882. On 2 March 1890 a judge was added by the Governor to the Court, but there was then no vacancy, and not only would not the Legislature provide a new salary—there having been a change of ministry—but a Bill to add an extra judge was thrown out. The question then arose whether the appointment was valid ; it was so held in the Supreme Court, but this was reversed by the Privy Council in *Buckley v. Edwards* <sup>1</sup> on appeal. It ruled that the power to create a judge who had no salary granted was contrary to the principle of the British constitution, as it would make him dependent on the Executive, and was not specifically, or by necessary intendment, justified by anything in the laws of New Zealand. Under Act No. 36 of 1923 temporary judges can be appointed only on a certificate by the Chief Justice and three judges out of the eight. The existing law <sup>2</sup> in New Zealand empowers the Crown to remove on address from both Houses, but the Governor-General in Council may suspend on address, or provisionally if Parliament is not in session, until the end of the next session. Under an Act of 1903 judges must retire at age 72, but the rule was not applied to existing judges.

The distinction which may be seen in these Australian Acts between giving the power of removal to the Crown or the Governor has one important implication. In the former case, the law officers of the Crown ruled in 1862 <sup>3</sup> in the case of Mr. Justice Boothby that the Crown must act deliberately, and cannot merely accept the wishes of the Legislature, but normally should take the opinion of the Privy Council on the propriety of action. In Mr. Boothby's case the impropriety complained of was his constant finding that Acts were illegal, often with some cause, but sometimes quite arbitrarily. The law officers then ruled that two addresses or one made no difference ; that no allegations of misconduct were essential, provided the Crown was satisfied *ab extra* that there was misconduct ; that perversity or disregard of judicial propriety obstructing the course of justice would be an adequate ground for removal ; but that, as some of the Acts assailed by the judge were invalid—not

Crown, as in 1 Geo. III, c. 23, and now quite generally for the Empire, 1 Edw. VII, c. 5.

<sup>1</sup> [1892] A. C. 387.

<sup>2</sup> No. 89 of 1908, ss. 8, 9. For salaries (£2,250, C.J., others £2,000), Act No. 4 of 1920.

<sup>3</sup> *Parl. Pap.*, August, 1862.

having been reserved by the Governor—and as the two Houses which passed the addresses were strictly speaking irregularly constituted, the electoral Act No. 10 of 1856 not having been reserved, they did not recommend removal. In 1866 another effort was made to remove this judge, but the Privy Council shared the views of the law officers that it was not a case for action by the Crown, and the Governor in Council in 1867 cut the knot by moving him under Burke's Act.<sup>1</sup>

In the case of the Cape<sup>2</sup> before union the Crown under the Charter of Justice could remove, the Governor under the royal instructions could suspend, and under Burke's Act the Governor in Council could remove. In Natal, under Act No. 14 of 1893 (ss. 43–5), removal was possible by the Crown on address from both Houses, while Burke's Act obviously applied. In the case of the Transvaal<sup>3</sup> and Orange River Colony<sup>4</sup> the provisions of the Commonwealth Constitution were rigidly followed, but of course letters patent could not bar Burke's Act. The Union Act<sup>5</sup> vests the appointment in the Governor-General in Council, provides that their salaries shall not be diminished while in office, and allows removal only on address from the Houses of Parliament on the ground of misbehaviour or incapacity, the term 'proved' being ignored as unnecessary and confusing, and possibly permitting the intervention of the Courts on the score that nothing had been proved. But the letters patent (s. 38) for Southern Rhodesia maintain the Commonwealth form, with 'proved' inserted, while those for Malta (s. 55) follow the same model. It should be added that the fact that provision is made in the civil list for judicial salaries is no bar to adding new judges without altering the civil list.

In Northern Ireland the judges hold office by the usual British tenure, subject to removal on addresses from the Houses of Parliament. It must, of course, be remembered that the British rule does not preclude the legal<sup>6</sup> right to remove by *scire facias*, or on an information at the suit of the Attorney-General, though the probability of cause arising for recourse to

<sup>1</sup> South Australia *Parl. Pap.*, 1867, Nos. 22, 23, 41.

<sup>2</sup> *Consol. Stat.*, 1652–1895, i. 95; Act No. 35 of 1896.

<sup>3</sup> Letters Patent, 6 Dec. 1906, s. xlviii.

<sup>4</sup> Letters Patent, 5 June 1907, s. 1.

<sup>5</sup> 9 Edw. VII, c. 9, ss. 100, 101.

<sup>6</sup> Todd, *Parl. Gov. in England*, ii. 857 ff.

these methods is minimal. There seems no reason to doubt that similar procedure is available in the Dominions in all cases in which it is not expressly provided, as in the Commonwealth Constitution and the Union Constitution, that removal shall only be by reason of address based on misbehaviour or incapacity. The British rule allows an address on any ground which seems good to Parliament, and permits special procedure for misconduct, the tenure being during good behaviour, and, apart from the power of Parliament, the Crown having an unquestioned right to revoke a patent of office when its essential condition is violated by the holder of office. It may be added that in the Dominions where the absolute restriction does not exist, there may possibly be the power of suspension by the Governor with a view to removal by the Crown ; but it is too remote a possibility to be worth examining.

The *Courts of Justice Act*, No. 10 of 1924, of the Irish Free State, constitutes a High Court under a President, and a Supreme Court under a Chief Justice of the Irish Free State.<sup>1</sup> The office of any judge of these Courts may be vacated by resignation, and that of a High Court judge by appointment to the Supreme Court, but only in these events is there power given to appoint another judge. The age of retirement in every case is 72 years, and a pension may be granted on retirement after five years' service on the ground of ill health, or in any case after fifteen years. The salaries are provided in the Act itself as £4,000 for the Chief Justice, £3,000 for the judges of the Supreme Court and the President of the High Court, and £2,500<sup>2</sup> for the other judges. Judges of Circuit Courts must retire at 70, but otherwise hold by the same tenure as other judges. The oath of office, needless to say, contains no reference to the Crown, in whose name proceedings are not carried out, but includes a promise of fidelity to the Constitution of the Free State.

<sup>1</sup> The judges are, under the Constitution, Art. 69, appointed by the Governor-General on the advice of the Executive Council, and can be removed only on resolutions of both Houses for stated misbehaviour or incapacity. Their salaries cannot be diminished during their tenure of office. Clearly removal would have to be by the Governor-General, and would not be effected by resolutions alone.

<sup>2</sup> South Australia (No. 1503, 1922) gives thus to the Chief Justice £2,500, the three judges £2,000 ; Tasmania (1920, No. 48) £1,800 and £1,500.

The Free State has made an important step in judicial organization in the direction of decentralization by the creation of eight Circuit Courts with a wide civil and criminal jurisdiction, appeals lying to the High Court in civil causes, and to the Court of Criminal Appeal in criminal matters. The result of this is to diminish the importance and quantity of the work which is brought before the High Court of six judges at Dublin, whose members also man the Central Criminal Court for specially serious offences. The final Court of Appeal is the Supreme Court of three judges. This may be compared with the Queensland decision in 1921 (No. 15) to abolish the District Courts and to substitute for them sittings of the Supreme Court consisting of one judge in the districts, the existing judges of the District Courts being transformed into Supreme Court judges.

Elsewhere the rule has been rather to assimilate practice to that of the Supreme Court in England. Thus in New Brunswick in 1913 (c. 23) the Court was reorganized as a Court of Appeal, of King's Bench, and of Chancery; Saskatchewan in 1915 (cc. 9, 10) set up a Court of Appeal and a Court of King's Bench. In 1919 an Act was passed in Quebec, which was repealed, but in large measure re-enacted in 1920, producing an improvement in organization by abolishing the Court of Review, which formerly presented an alternative to going to the Court of Appeal, so that there were left the Court of Appeal, and the Superior Court, the latter concentrated practically at Montreal and Quebec. The changes in Ontario in 1909 and in 1923 (c. 23) in effect merely establish a High Court Division and an Appellate Division, the latter sitting in two Divisions, each under a Chief Justice. In 1924, however, by c. 30, a change was proposed, it being desired to reconstitute the Court with one Appellate Division, and to authorize the Lieutenant-Governor in Council to assign judges to the Appellate Division, appointing one Chief Justice of Ontario, and to appoint another to be Chief Justice of the High Court. This was a barefaced attempt to encroach on the power of appointment vested in the Dominion Government and was ruled to be *ultra vires* by the Privy Council, though the right of the province to deal with the organization of the Court in general was not disputed.<sup>1</sup>

<sup>1</sup> *A.-G. for Ontario v. A.-G. for Canada*, [1925] A. C. 750; 56 O. L. R. 1.

The Constitution of the Irish Free State formally enacts a maxim of general application, that judges shall be independent in the exercise of their judicial functions and subject only to the Constitution and the law. A judge shall not be eligible to sit in Parliament and shall not hold any other office or position of emolument, a provision intended to strike at the holding of office in connexion with Governmental boards. The enactment does not directly prohibit judges being employed to sit on Royal Commissions, if they are not remunerated for their services. The question of the propriety of the employment in such a capacity of Dominion judges<sup>1</sup> has often been mooted, on the score that it may impose an undue burden on the judges, interfere with the punctual performance of their judicial duties, and possibly place them in a position in which their work on a Commission might impair their power of being regarded as impartial adjudicators on matters coming before them as judges. The matter obviously admits of no general rule.

### § 2. *The Nature of Judicial Functions*

In the Dominions as in the United Kingdom a tendency exists for legislatures to impose on executive boards or individuals duties of determination of legal rights and liabilities, which in effect invest these authorities with the power of performing judicial functions proper. In the exercise of such functions such bodies may be exempt from all judicial appeal, but inevitably they are subject to the control of the Courts in order to determine that they shall keep within the limits of the powers assigned to them, and, however wide may be that authority and however completely any intervention by the Courts may be excluded so long as they act within the sphere of their authority, it must always remain for the Courts to decide the extent of that sphere, and if necessary to exercise in this regard their powers of *mandamus*, *certiorari*, and prohibition.<sup>2</sup> The only respect in which Dominion practice differs from English usage is perhaps the increasing tendency to exclude the

<sup>1</sup> On the inadequacy of Canadian salaries, increased in 1919 but made liable to income tax, see *C. L. T.* xxxix. 438 ff., 709 f.; 4 *Can. Bar Review*, 162-8. For local taxation of County Court judges' salaries, see *City of Toronto v. Morson* (1917), 38 D. L. R. 224.

<sup>2</sup> See, e. g., *R. v. Electricity Commissioners*, [1924] 1 K. B. (C. A.) 171.

intervention of the Law Courts, and in England also there has been a distinct tendency of late in the same sense.

In England a controversy of no great value has raged as to the power of the Crown to hold Executive inquiries, and there is legal opinion in the case of the Oxford University Commission to the effect that it is improper for the Crown to investigate by executive forms charges of misconduct against a corporation, seeing that it is possible to proceed judicially by information in the Court of King's Bench.<sup>1</sup> These views are clearly valueless for the case of England, and such restriction on Executive inquiries as may exist rises simply from the inability of the Crown without legislation to compel witnesses to give evidence or to take an oath. But it has been contended successfully in New Zealand<sup>2</sup> that it is an illegal invasion of the judicial power for the Crown to inquire by whom an offence has been committed or whether any penalty or forfeiture has been incurred, it being held that such an inquiry is within the mischief provided against by the Act 42 Edward III, c. 3, and the Act for the abolition of the Star Chamber (16 Car. I, c. 10), which may be held to be in force as part of the English law introduced into the Dominion. It is clear that this decision is wrong, and it conflicts with a decision of much higher authority, the High Court of the Commonwealth in *Clough v. Leahy*,<sup>3</sup> on appeal from the Supreme Court of New South Wales. In that State, as in the rest of Australia, a general power<sup>4</sup> exists by statute enjoining witnesses to answer on oath questions put by Royal Commissions, and a witness was prosecuted for refusal to answer questions, the inquiry being one regarding the operation of a certain industrial union, whether it was an evasion of two Acts of Parliament, and whether it hampered the Industrial Arbitration Court in its dealing with the pastoral industry. It was contended that the matter fell within the sphere of the Arbitration Court, and that the Executive could not properly employ its powers to deal with it, and this contention succeeded in the Supreme Court<sup>5</sup> but was rejected by the

<sup>1</sup> Harrison Moore, *Columbia Law Review*, xiii. 500 ff.; *Parl. Pap.*, 1852, xxvi. 331 ff., 341.   <sup>2</sup> *Cock v. Attorney-General and another* (1909), 28 N. Z. L. R. 405.

<sup>3</sup> (1904) 2 C. L. R. 139; cf. *Cox v. Coleridge*, 1 B. & C. 37.

<sup>4</sup> No. 23 of 1901. See, e.g., Commonwealth Acts No. 12 of 1902; No. 4 of 1912.

<sup>5</sup> (1904) 4 S. R. (N. S. W.) 401.



High Court, which clearly held that an inquiry into guilt or innocence was not a judicial proceeding.

The matter, of course, assumes a different aspect when, as in the case of the Commonwealth Constitution, there is a formal division of powers, and it is possible to contend that the Executive must not encroach on the Judiciary. But, as we have seen, the High Court has recognized that the Executive has a wide sphere of action, and the limitation imposed on it by the Privy Council in *Attorney-General for the Commonwealth v. Colonial Sugar Refining Co.*<sup>1</sup> does not depend on the distinction between judicial and executive powers, but on the limited extent of the legislative, and, in consequence, of the executive authority of the Commonwealth *vis-à-vis* the States.

A different aspect of the question is presented in the protests which from time to time have been made against the intervention of judicial inquiries in the sphere of Parliament. The handing over to the judges of election petitions was only with hesitation, and sometimes under reservations, conceded in the Dominions. In 1873, when it had proved impossible under the Constitution of the Dominion to confer on a Committee of the Commons power to take evidence on oath regarding the Pacific Railway scandals, the solution of appointing a royal commission of three judges was impugned by Mr. Seth Huntington, the author of the gravest attacks, and he refused to give evidence on the score that the procedure was a violation of the rights of Parliament.<sup>2</sup> The same argument was adduced in 1910, when the Government of Western Australia appointed a commission to inquire into charges against the Land Department, it being claimed that Members of Parliament were thus rendered liable to give evidence on oath as ordinary witnesses,<sup>3</sup> and the demand being made<sup>4</sup> that if procedure was to take the form of a non-Parliamentary inquiry, it should at least be carried out under a special Act of Parliament, as in the case of the Parnell inquiry in the United Kingdom.<sup>5</sup>

<sup>1</sup> [1914] A. C. 237. Cf. Part IV, chap. ii, § 4 (j).

<sup>2</sup> *Parl. Pap.*, C. 911, pp. 77 ff., 87, 90.

<sup>3</sup> 1 & 2 Edw. VII, No. 28.

<sup>4</sup> *Parl. Deb.*, 1910–11, pp. 1502–51.

<sup>5</sup> For Lord Herschell's disapproval of the Act, see *Hansard* (3rd ser.), cccxxx. 278.

## DOMINION JURISDICTION UNDER IMPERIAL ACTS

§ 1. *Admiralty Jurisdiction*

THE *Admiralty Offences (Colonial) Act*, 1849,<sup>1</sup> confers on Colonial Courts the power to deal with any persons who are within the Colony, or are brought there for trial, in respect of treason, piracy, felony, robbery, murder, conspiracy, or other offence committed within the Admiralty jurisdiction in the same manner as if the crime had been committed in the waters of the Colony. The sentence by s. 2 is to be that appropriate under English law, but that was altered by an Act of 1874<sup>2</sup> to substitute the local penalty for such an Act, or the appropriate English penalty. The Act also declares cases where a person dies at sea from injury on land or vice versa to be within colonial jurisdiction. It has been held that Admiralty jurisdiction applies to British ships in foreign territorial waters, even indeed on navigable rivers far inland, and in respect of foreigners on such ships whether on the high seas or on navigable rivers.<sup>3</sup> But Admiralty jurisdiction was ruled in *R. v. Keyn*<sup>4</sup> not to apply to foreigners on foreign ships in respect of offences committed in English territorial waters, and the defect was removed by the *Territorial Waters Jurisdiction Act*, 1878,<sup>5</sup> which allows such an offence to be treated as committed within the jurisdiction of the Admiralty. In the case of any prosecution in a Colony the consent of the Governor is requisite, but it seems clear that, apart from this statute, the power to apply the criminal law of a Colony within its territorial waters exists as a matter of right, and foreign fishing vessels are regularly proceeded against in Colonies without any regard to the terms of

<sup>1</sup> 12 & 13 Vict. c. 96; 28 Hen. VIII, c. 15; 11 Will. III, c. 7; 46 Geo. III, c. 54; 9 Geo. IV, c. 83; 7 & 8 Vict. c. 2.

<sup>2</sup> 37 & 38 Vict. c. 27, s. 3, passed in consequence of *Reg. v. Mount*, L. R. 6 P. C. 283.

<sup>3</sup> *Reg. v. Anderson* (1868), 10 App. Cas. 59; *Reg. v. Carr* (1882), 10 Q. B. D. 76. See 4 & 5 Will. IV, c. 36, s. 22. Cf. *Reg. v. Armstrong*, 13 Cox, C. C. 185.

<sup>4</sup> (1876) 2 Ex. D. 63; *The Franconia* (1877), 2 P. D. 163.

<sup>5</sup> 41 & 42 Vict. c. 73. Cf. Keith, *J. C. L.* viii. 290 f.

the Act of 1878.<sup>1</sup> An Act of 1860<sup>2</sup> provides that colonial Legislatures may provide for the punishment of offenders in cases where an unlawful wounding or poisoning takes place within a Colony, but the death occurs outside. This extends the powers of s. 3 of the Act of 1849, which merely applies to cases where punishment was requisite for instances where the stricken man dies at sea.

This jurisdiction of the Admiral, which was transferred to Commissioners in England under an Act of Henry VIII, and ultimately from 1844 may be regarded as reduced to a branch of the ordinary criminal law, was exercised by Vice-Admiralty Courts in the Colonies until transferred under William III to Commissioners, while in 1806 the law administered was transformed from the civil law to the ordinary law of the realm.

In civil matters Admiralty jurisdiction could be exercised by Vice-Admiralty Courts, facilities for establishing which, under the seal of the Admiralty, were conferred by Imperial Acts of 1863 (c. 24) and 1867 (c. 45); in 1863 there were such Courts in Canada, in British Columbia, Vancouver Island, Quebec, and the three Maritime Provinces, but it was ruled in *R. v. Sharp*<sup>3</sup> that, though the great lakes of Canada were within the jurisdiction of the Admiral, the process of the Quebec Vice-Admiralty Court did not apply. A Maritime Court for Ontario was created by Dominion Act in 1877.<sup>4</sup> In 1890<sup>5</sup> the plan of having Vice-Admiralty Courts was generally abandoned in favour of conferring on the ordinary colonial Courts Admiralty jurisdiction. Under s. 3 of that Act the legislature of any British possession may declare any Court, original or appellate, of unlimited civil jurisdiction to be a colonial Court of Admiralty and provide for the exercise of its jurisdiction, which it may limit territorially or otherwise. It may also confer on any inferior Court such limited jurisdiction as it deems fit, subject to such appeal as is approved, as was done in Western Australia in 1918 by No. 2, but in neither case can any jurisdiction be

<sup>1</sup> See also *R. v. Kahitaska*, 8 W. A. L. R. 154, and cf. *Mortensen v. Peters* (1906), 8 F. (Just.), 93.

<sup>2</sup> 23 & 24 Vict. c. 122.

<sup>3</sup> 5 Ont. Pract. R. 135. As to the other provinces before 1890, see *Bergman v. 'Aurora'* (1893), 3 Ex. C. R. 228.

<sup>4</sup> 40 Vict. c. 21. Cf. *The Picton* (1879), 4 S. C. R. 648.

<sup>5</sup> 53 & 54 Vict. c. 27.

conferred which is not given to a Colonial Court of Admiralty by s. 2. That section confers on any Court declared by a Legislature to be a Colonial Court of Admiralty, and on any colonial Court with unlimited civil jurisdiction in a Colony in which no declaration has been made, the full authority of the Admiralty Division of the High Court ; such a Court must, like that Court, pay due regard to international law and the comity of nations. References to Vice-Admiralty Courts in Imperial or Colonial Acts are to read as references to Colonial Courts of Admiralty. The powers, however, of Colonial Courts of Admiralty under the *Naval Prize Act*, 1864, and the *Slave Trade Act*, 1873, are to be those only ascribed to Vice-Admiralty Courts by these Acts,<sup>1</sup> and the Courts are to exercise no power as to naval prize unless specially conferred, for which provision is made in the *Prize Courts Act*, 1894.<sup>2</sup> As regards powers over the Royal Navy these are to be such as may be conferred by Order in Council, and no offence punishable in England on indictment may be tried under the powers of the Act. Any colonial law regulating Admiralty jurisdiction under the Act must, if not previously approved by the Crown through a Secretary of State, be reserved, or contain a suspending clause. In every case an appeal lies of right to the Crown in Council from Admiralty cases,<sup>3</sup> but in the event of the decision being one of a subordinate Court, only after the local appeal, if any. Rules of Court require the approval of the Crown in Council, but in approving the Crown may declare certain rules to be such as may in future be varied without further consent, and rules must not deal with slave trade matters. Power is given to the Crown by commission under the Great Seal to authorize the Admiralty to establish Vice-Admiralty Courts in any British possession with such part of the jurisdiction conferred by the Act as may be desired, and, while such jurisdiction is transferred, the power of any Colonial Court of Admiralty is *pro tanto* suspended. But in a Colony with a representative Legislature or India such Vice-Admiralty Courts can exercise only jurisdiction in prize, as to the navy, as to slave trade matters, the *Foreign Enlistment Act*, 1870, the *Pacific Islanders Protection Acts*, 1872 and 1875, and questions

<sup>1</sup> See, e. g., under 5 Geo. IV, c. 113, *Barton v. Reg.*, 2 Moo. P. C. 19.

<sup>2</sup> Cf. 5 & 6 Geo. V, c. 57 ; 6 Geo. V, c. 2.

<sup>3</sup> *Richelieu and Ontario Navigation Co. v. SS. 'Cape Breton'*, [1907] A. C. 112.

relating to treaties or conventions and international law. Appeal lies from such Courts of Admiralty to the Crown in Council, and any such Court may be abolished<sup>1</sup> on direction by the Crown.<sup>2</sup>

The Admiralty jurisdiction of Canada was vested by Act in the Exchequer Court in the fullest degree, there being also created local judges in Admiralty subject to the appeal to the Judge of the Exchequer Court. The extent of this jurisdiction has been discussed in collision cases, which the Imperial Court treats as *communis juris*, ignoring the nationality or place of the collision.<sup>3</sup> It was, however, held by the Supreme Court<sup>4</sup> overruling the Exchequer Court that the latter must not exercise jurisdiction over two American vessels in respect of a collision in an American port on the great lakes, because the warrant for the arrest was issued before she came into Canadian waters, her presence there was merely transitory on a voyage from one United States port to another, and she was arrested in the Detroit River channel, which under the Ashburton Treaty of 1842 is declared equally free to either country. The Canadian Act purports to make the decision of the Supreme Court of Canada on appeal final and conclusive, but that is, of course, *ultra vires* the Act of 1890, and has been so ruled.<sup>5</sup> The Exchequer Court, not having any general jurisdiction, has been held in *Bow, McLachlan & Co. v. Ship 'Camosun'*,<sup>6</sup> to be unable to entertain a counter-claim for failure in building a ship on a claim for a mortgage debt.

<sup>1</sup> This was done in 1917 in view of the foolish conduct of Martin, Local Judge in British Columbia; see 37 C. L. T. 296 ff.

<sup>2</sup> It has been held in Canada that the Dominion Parliament may impose duties on a Vice-Admiralty Court unless forbidden by Imperial Act; *A.-G. for Canada v. Flint*, 16 S. C. R. 707; 3 N. S. 453. So, as to a Colonial Court of Admiralty, *R. v. Annie Allen*, 5 Ex. C. R. 144.

<sup>3</sup> Dicey and Keith, *Conflict of Laws* (ed. 4), pp. 729 ff., 869 f.

<sup>4</sup> *Ship 'D. C. Whitney' v. St. Clair Navigation Co.* (1907), 38 S. C. R. 303. Cf. *Dunbar Dredging Co. v. The Milwaukee* (1907), 11 Ex. C. R. 179; *Dunbar & Co. v. The Amazonas*, 13 Ex. C. R. at p. 498. Smith (41 L. Q. R. 423-32) suggests that the Admiralty jurisdiction of colonial Courts has been extended without consultation by the *Administration of Justice Act*, 1920, s. 5, though this has not been so decided in Canada (see *The Aledo*, [1923] Ex. C. 217; *The Ister*, *ibid.*, 212; (contrast *The Ingelby*, *ibid.*, 208, deciding that the *Merchant Shipping (Stevedores & Trimmers) Act*, 1911, applies to Canada). In view of the express restriction of the Act of 1920 by s. 21 (3) to England, this view seems to me untenable.

<sup>5</sup> p. 1081, n. 3.

<sup>6</sup> [1909] A. C. 397.

In the Commonwealth, New South Wales and Victoria came under the Act of 1890 only by Orders in Council of 4 May 1911, these colonies having objected to the application to them of the Act of 1890 for no very intelligible reason. The establishment of the Commonwealth did not result in the creation of the High Court as a Colonial Court of Admiralty under the Act of 1890, though under s. 76 (iii) of the Constitution Admiralty jurisdiction may be conferred upon it. From the State Courts in their Admiralty jurisdiction appeals lie to the High Court or to the Privy Council as of right, and there seems no doubt that such appeals would lie of right from Admiralty jurisdiction conferred under the Constitution, as the Act of 1890 would still apply. This was made clear in s. 106 of the Act of 1909 creating the Union of South Africa.

Section 8 of the Act of 1890 provided that nothing should affect the destination of droits of Admiralty, or droits of or forfeitures to the Crown, though these might be surrendered by the Crown by Order in Council, the intention being to make the surrender conditional on acceptance of colonial responsibility for any damages payable in respect of failure to observe neutrality, the Imperial Government having paid the damages caused by the negligence of the Victorian Government as to the *Shenandoah* in 1865.<sup>1</sup> No arrangements were arrived at, and now the obligation to observe neutrality would be borne by the Dominion concerned, just as it has always been responsible for damage done on land to foreigners, as in the case of the riots at Fortune Bay in Newfoundland in 1878<sup>2</sup> and the Vancouver riots of 1907.<sup>3</sup> In point of fact it appears fairly certain from the Imperial Acts granting Constitutions to New South Wales, Victoria, Western Australia, and approving the Constitution of Queensland<sup>4</sup> that the Crown had already surrendered its droits, and the South Australian<sup>5</sup> and Tasmanian<sup>6</sup> Constitutions aimed at the same result, though technically as local Acts they could hardly have this effect. The droits were not included in the Act

<sup>1</sup> Morris, *Memoir of George Higinbotham*, pp. 83-93. Jamaica, a Crown Colony, had to pay half the cost of the illegal detention of the *Florence*; *Parl. Pap.*, C. 3453, 3523.

<sup>2</sup> *Parl. Pap.*, C. 2184, 2717, 2757, 3059, 3762.

<sup>3</sup> *Canadian Annual Review*, 1907, p. 391.

<sup>4</sup> 18 & 19 Vict. cc. 54, 55; 24 & 25 Vict. c. 44; 53 & 54 Vict. c. 26.

<sup>5</sup> No. 2 of 1855-6.

<sup>6</sup> 18 Vict. No. 17.

of 1852 authorizing general surrender of these rights, but the matter is of academic interest, and both New Zealand and the Commonwealth in their navigation legislation appropriated the proceeds.

The matter, however, was revived through the experiences of the war, which resulted in the condemnation of a number of vessels as prize by Dominion Courts authorized by the Crown to act as Prize Courts. The question as to the disposal of vessels thus adjudicated was left over for decision at the close of the war. Two droits were involved, those of Admiralty, and of the Crown, corresponding roughly to prizes captured in harbour and at sea. The former belong to the Exchequer,<sup>1</sup> the latter to the Naval Prize Fund, for distribution to the officers and men of the fleet, including, of course, the Dominion navies. Droits of the Crown were thus comparatively easy to dispose of, and the matter was settled by the *Naval Prize Act*, 1918.<sup>2</sup> As regards droits of Admiralty a settlement was only achieved in 1926. Canada agreed that all rights and liabilities in such cases should rest on the Imperial Government. The Union of South Africa begged that four vessels condemned locally and made available for use by the Union Government should be handed over absolutely and unconditionally, and the request was acceded to. In the case of the Commonwealth of Australia and India it was agreed to transfer a number of ships and cargo absolutely to these Governments in return for their undertaking to assume liability for unrecovered expenditure connected with local prize proceedings, including legal expenses and grants made on the recommendation of the Prize Claims Committee. New Zealand and Newfoundland were not concerned, no prize proceedings having taken place in these Dominions.<sup>3</sup>

## § 2. *Jurisdiction under the Merchant Shipping and other Acts*

The *Merchant Shipping Act*, 1894, by s. 686, without derogating from the Act of 1849 as to Admiralty offences, authorized any Court to deal with any British subject committing an

<sup>1</sup> Cf. *The Maria Françoise*, 6 C. Rob. 282, 297, *per* Sir William Scott; 42 L. Q. R. 22-4. The Imperial Government in 1910 had intimated readiness to bear liability for prize captures.

<sup>2</sup> 8 & 9 Geo. V, c. 30.

<sup>3</sup> *Parl. Pap.*, Cmd. 2685. For Malta's Prize Court see *J. S. C. L.*, 1916, pp. 67-71.

offence on any British ship anywhere, or on any foreign ship to which he does not belong, and any alien committing any offence on any British ship on the high seas only. Section 687 gives Admiralty jurisdiction in the case of any master, seaman, or apprentice, in respect of any offence committed ashore or afloat, against property or person, if he is a member or has within three months before been a member of the crew of a British ship. Section 478<sup>1</sup> again allows the Legislature of any possession to provide for inquiries into shipwrecks and casualties and accusations of misconduct by masters, mates, and engineers, in the case of the matters involved happening off or near the coast of the possession, or to British vessels *en route* to the possession, or happening anywhere to a vessel registered therein, or where members of the crew or the offending person are found within the possession. An inquiry must not be held if one has already taken place in a competent Court, or the certificate of a master, mate, or engineer has been cancelled or otherwise dealt with by a Naval Court. No inquiry may be begun if one has been started in England. The Court has the power to cancel or suspend a certificate, but the Board of Trade may order a rehearing, and an appeal lies to the High Court.<sup>2</sup> No appeal, however, lies in the case of a vessel registered in the possession where the inquiry takes place, nor unless the certificate affected was granted in the United Kingdom or in some other British possession. It is, however, provided in s. 474 of the Act that the Board of Trade may return, if it thinks fit to reduce the period for which it has been suspended, any certificate dealt with in any Court, a provision which caused much annoyance in the Commonwealth, and led to proposals for its curtailment in the Navigation Bill.<sup>3</sup>

Further powers are conferred on colonial Courts by a number of Acts, such as the *Slave Trade Acts*, the *Pacific Islanders Protection Acts*, 1872 and 1875, the *Foreign Enlistment Act*, 1870, the *Fugitive Offenders Act*, 1881, as regards crimes committed

<sup>1</sup> Formerly 17 & 18 Vict. c. 104, s. 242 ; 25 & 26 Vict. c. 63, s. 23 ; 45 & 46 Vict. c. 76 (passed to undo the result of *In re Victoria Steam Navigation Board*, 7 V. L. R. 248).

<sup>2</sup> Cf. *The Chilston*, [1920] P. 400, where it was ruled that a decision of a local Court of Inquiry could be overruled, despite the Canadian Act, 7 & 8 Edw. VII, c. 65, s. 37. See *S. R. & O.* 1923, No. 752, s. 19.

<sup>3</sup> Keith, *Imperial Unity and the Dominions*, p. 228.



on the boundaries of Colonies or on journeys between two Colonies, the *Army Act*, 1881 (ss. 154 and 168),<sup>1</sup> the Acts respecting treason,<sup>2</sup> the *Coinage Offences (Colonial) Act*, 1853, the *Coinage Act*, 1870, the *Official Secrets Acts*, 1911 and 1920, the Acts to enforce the Behring Sea award, 1894, and the quadrupartite Seal Fisheries Convention of 1911 (2 & 3 Geo. V, c. 10), the *Geneva Convention Act*, 1911, and the *Extradition Act*, 1870, when applied by Order in Council to any British possession. Legal procedure is dealt with in the *British Law Ascertainment Act*, 1859,<sup>3</sup> the *Foreign Law Ascertainment Act*, 1861,<sup>4</sup> and the *Foreign Tribunals Evidence Act*, 1856.<sup>5</sup> Victorian notaries still are appointed under the Act of Henry VIII.<sup>6</sup>

<sup>1</sup> As regards deserters (s. 154) and generally (s. 168) where provision is not specially made by local law for proceedings in respect of offences under the Act.

<sup>2</sup> 35 Hen. VIII, c. 2 ; local legislation is normal and action is taken under it, as often in South Africa ; so also in the Irish Free State (see *Treasonable Offences Act*, No. 18 of 1925).

<sup>3</sup> 22 & 23 Vict. c. 63 ; *Login v. Coorg* (1862), 30 Beav. 632.

<sup>4</sup> 24 & 25 Vict. c. 11.

<sup>5</sup> 19 & 20 Vict. c. 113. The power of framing regulations given by s. 6 to the Lord Chancellor is not exercised as regards the Dominions.

<sup>6</sup> 25 Hen. VIII, c. 21 ; *Baillieu v. Vict. Soc. of Notaries*, [1904] P. 180.

### III

## JUDICIAL APPEALS

### § 1. *The Prerogative in the Dominions*

THE prerogative of the Crown to hear appeals from Dominion Courts was, incidentally but effectively, made statutory by the *Judicial Committee Act*, 1844, which gives the power to the Crown in Council to provide for appeals from any Court of Justice in any British Colony or possession. This statutory right, the importance of which was long overlooked in discussions of the matter, was stressed by the writer on various occasions, and was finally expressly applied by the Privy Council in *Nadan v. The King*<sup>1</sup> on appeal from the Supreme Court of Alberta, Appellate Division. It was objected that under s. 1025 of the Criminal Code of Canada 'notwithstanding any royal prerogative or anything contained in the *Interpretation Act* or the *Supreme Court Act* no appeal shall be brought in any criminal case from any judgement or Order of any Court in Canada to any Court of Appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard'. The Privy Council indicated that the Act did not appear to apply to action in the United Kingdom, but frankly admitted that it was repugnant to the *Judicial Committee Acts* of 1833 and 1844, and, therefore, void. The Privy Council in this case did not decide whether the Act was sufficient to render invalid the permission to appeal to the Privy Council granted by the local Court, but assumed that it might be. This, however, is clearly wrong, for the Order in Council regulating appeals from Alberta on the strength of which leave was granted is an Imperial Order made under the authority of the Act of 1844, and clearly overrides the Act of Canada as effectively as the Imperial Act itself. The Council refused to grant special leave, as the case was criminal and did not fall under the category of cases where it is shown that by a disregard of the forms of legal process or by the violation of the principles of natural justice or otherwise, substantial and grave injustice has been done. It will be seen, therefore, that

<sup>1</sup> (1926) 42 T. L. R. 356. See *Imperial Unity and the Dominions*, pp. 368 ff.

their Lordships thus negatived a right of the lower Court, expressly conferred by Imperial Order in Council.

It should, however, be noted that the Act of 1833 referred to by the Privy Council does not create the right in the form given in the Act of 1844, and, save for the Act of 1844, it is clear that the prerogative could be barred, for the suggestion that the matter is beyond Colonial authority because the appeal is heard in the United Kingdom<sup>1</sup> is of no value.<sup>2</sup> The Legislature, but for the Imperial Act, could simply enact that none of the proceedings or documents relating thereto could be removed from the Court and that no effect should be given in the Colony to any Order of the Privy Council or of the local Court based on that of the Privy Council. In *Cuvillier v. Aylwin*<sup>3</sup> the prerogative was actually held to have been barred, though the decision was manifestly wrong, for the Act saved the prerogative, so far was it from taking it away; and the cases of *In re Louis Marois*<sup>4</sup> and *Cushing v. Dupuy*<sup>5</sup> disposed of any authority the earlier case had. In *In re Wi Matua's Will*<sup>6</sup> it was ruled that the prerogative could not be barred even by an Imperial Act without express words, and the same doctrine was repeated in *Webb v. Outtrim*.<sup>7</sup>

Appeals from Dominion Courts come in two forms, either without special leave from the Privy Council itself, or by special leave. Of the first class there are now two forms; in certain instances laid down by local Acts, or more usually Orders in Council, appeals lie as of right when the conditions as to the value—often £500—of the matter in dispute are fulfilled, or some issue of status is concerned; or now under the changes made as a result of the Colonial Conference of 1907,<sup>8</sup> in 1910 and 1911 the local Court can itself grant special leave to appeal

<sup>1</sup> Wheeler, *Conf. Law*, p. 34; Quick and Garrahan, *Const. of Commonwealth*, p. 762.

<sup>2</sup> The Act of 1844 was passed to undo decisions that an appeal could lie only from a Court of Errors; *In re Assignees of Manning*, 3 Moo. P. C. 154; *In re Cambridge*, *ibid.*, 175; Safford and Wheeler, *Privy Council Practice*, p. 713.

<sup>3</sup> (1832) 2 Knapp, 72.

<sup>4</sup> 15 Moo. P. C. 189.

<sup>5</sup> (1880) 5 App. Cas. 409.

<sup>6</sup> [1908] A. C. 448.

<sup>7</sup> [1907] A. C. 81.

<sup>8</sup> *Parl. Pap.*, Cd. 3523, pp. 200 ff.; Cd. 3524, pp. 179 ff.; Cd. 5273, pp. 26 ff. As to criminal appeals under this power, cf. *Hong Kong v. A.-G.*, [1910] T. P. 432. In any case of doubt special leave is needed; *Gillett v. Lumsden*, [1905] A. C. 601.

if in its opinion the question involved is one which, by reason of its great general or public importance or otherwise, ought to be submitted to the King in Council for decision. Appeals by special leave may be granted on any ground thought sufficient by the Privy Council, but its practice varies from time to time. Criminal appeals, as has been mentioned, it is most reluctant to hear,<sup>1</sup> though it consented to do so in the famous case of the Canadian rebel *Riel*,<sup>2</sup> whose fate aroused extraordinary bitterness in Canada, thus rendering the intervention of the Privy Council advisable, while serious points of law arose for decision. In *Carey v. Roots*, on 7 May 1914, the Privy Council declined to allow an appeal in the case of a matter of considerable importance, where the Supreme Court had reversed a decision of the Appellate Division of the Supreme Court of Alberta, the Lord Chancellor remarking that in the past there had been some laxity in admitting such appeals, as the *Supreme Court Act* of the Dominion indicated the desire that appeals should be as few as possible.<sup>3</sup> In point of fact that Act was originally drafted to seek to cut off the appeal, but it was altered to save the prerogative, when it was intimated that it would otherwise not receive the royal assent. There has been shown distinct reluctance to grant leave to appeal from the Appellate Division of the Supreme Court of the Union.<sup>4</sup> In 1925 the question of appeals from the Irish Free State came before the Privy Council. The appeal lies under Article 66 of the Constitution, having been introduced by reason of the application<sup>5</sup> to the Free State of the status of a Dominion with a Constitution like that of the Dominion of Canada, and the suggestions that no appeal lies are absurd. But the Council declined to hear an appeal where the issue involved was the right of a Bishop of the Roman

<sup>1</sup> *Lanier v. R.*, [1914] A. C. 221; *Vaithinatha Pillai v. King Emperor*, 40 Ind. App. 193; *Bugga v. K. E.*, [1920] W. N. 88; Keith, *J. C. L.* viii. 133; *Dal Singh v. K. E.* (1917), 86 L. J. P. C. 140.

<sup>2</sup> (1885) 10 App. Cas. 675. Contrast *Falkland Islands Co. v. Reg.*, 1 Moo. P. C. (N. S.) 299, 312; *In re Dillet* (1887), 12 App. Cas. 459; *Tshingumuzi v. A.-G. of Natal*, [1908] A. C. 248; *In re Carew*, [1897] A. C. 719; *Kali Nath Roy v. K. E.*, 37 T. L. R. 162; *Arnold v. K. E.*, [1914] A. C. 644.

<sup>3</sup> *Albright v. Hydro-Electric Comm.*, [1923] A. C. 167, 169.

<sup>4</sup> *Whittaker v. Durban Corporation* (1920), 36 T. L. R. 784. The principles there asserted have been chiefly honoured in the breach.

<sup>5</sup> Keith, *J. C. L.* vi. 204 f.; iv. 233 f.

Catholic Church to remove from office a priest without giving him notice of the proceedings as a result of which the decree of removal was issued.<sup>1</sup> It consented, however, to grant leave in a case<sup>2</sup> where it was alleged that, the tenant having died before the appointed day, the land never fell under the power of the Land Commission under the Irish *Land Act*, 1923. The Free State proceeded to enact<sup>3</sup> that the correct interpretation of the Act was that held in the Supreme Court, thus nullifying in advance any contrary decision of the Privy Council. The Lord Chancellor in discussing this matter curiously and rather amazingly asserted that it was this sort of case which it had been intended to secure as matter for appeal in the Constitution, whereas it is clear from that instrument that constitutional issues alone were really intended to be safeguarded, since they alone are of Imperial interest. No exception was taken to the hearing of an appeal as to the compensation due to officers of the former Government vacating office under the new régime.<sup>4</sup> In the case of the Commonwealth appeals are rather freely allowed on those matters which are within the permissible sphere, including cases of a rather individual and paltry nature. If, therefore, the doctrine is accepted that appeals are allowed only in matters of special importance, it must be added that the Court from time to time is the sole judge of what is important, and the judgement of the Court is not in every case such as would occur to the ordinary opinion of importance. The Court, however, acts on the principle of refusing leave if the law is really satisfactorily clear, however important the issue.<sup>5</sup> Otherwise the theory is that appeals from the highest Dominions Courts are allowed only when the case is of gravity, involving matters of public interest or some important question of law as affecting property of considerable amount, or where the case is otherwise of some public importance or of some very substantial character.<sup>6</sup> The Council will avoid answering abstract

<sup>1</sup> *O'Callaghan v. O'Sullivan*, *The Times*, 8 Dec. 1925 ; [1925] 1 Ir. R. 90.

<sup>2</sup> *Lynam v. Butler*, *The Times*, 8 Dec. 1925 ; [1925] 2 I. R. 82.

<sup>3</sup> See Mr. O'Higgins, 27 Jan., 3 Feb. 1926 ; Act No. 12 of 1926.

<sup>4</sup> *Wigg and Cochrane v. A.-G. of I. F. State*, 43 T. L. R. 457.

<sup>5</sup> *Rex v. Louw*, [1904] A. C. 412.

<sup>6</sup> *Daily Telegraph Newspaper v. McLaughlin*, [1904] A. C. 777 ; *Prince v. Gagnon* (1883), 8 App. Cas. 103 ; *Carter v. Molson*, *ibid.*, 530 ; *Clergue v.*

questions, and it very often decides cases on some comparatively minor issue evading a decision of large questions, on the principle that these matters should be disposed of only when they are absolutely necessary for the decision in a concrete case.

In the case of Canada, the Commonwealth, and the Union there is no appeal as of right, all appeals requiring special leave. Suitors in the first two cases have the choice of appealing to the Privy Council or the Supreme or High Court respectively, but, if a suitor chooses the latter, he will have great difficulty in being permitted to appeal again to the Privy Council ; <sup>1</sup> on the other hand, a suitor who has been taken to the Dominion or Commonwealth Court on appeal will more readily be permitted to carry the matter to the Privy Council. As of right, an appeal normally lies from the highest Appellate Court in any territory, and it is rare to allow an appeal direct from any lower Court. There are, however, exceptions, as under the law of Quebec and in New Zealand where appeals can be brought by special leave, or leave of the Court itself, from the Supreme Court in cases where there is no appeal to the Court of Appeal.

The rules as to appeals were, as mentioned, simplified and enacted, usually by Order in Council, after the Colonial Conference of 1907, which pointed out the desirability of bringing the old rules up to date with a view to accelerating procedure and removing technical delay. It was agreed also that the Courts below should be given power to grant special leave. Regulation by local Act thus exists only in Ontario, Quebec, and Newfoundland. In Quebec there was much indignation <sup>2</sup> in 1913-14 against the Privy Council for its decision that certain legislation as to estate duties by the province was invalid as indirect taxation, and an Act was passed in 1914 (c. 11), in which the Privy Council was directly assailed, and it was provided that the impugned tax was a direct tax, and recovery of sums paid under it was prohibited. The Privy Council in its judgement had made in point of fact a misstatement, which should not have occurred in the judgement of a final tribunal,<sup>3</sup>

*Murray*, [1903] A. C. 521 ; *C. P. R. Co. v. Blair*, [1904] A. C. 453 ; *Victorian Rail. Comm. v. Brown*, [1906] A. C. 381.

<sup>1</sup> *Victorian Railway Commrs. v. Brown*, 3 C. L. R. 1132.

<sup>2</sup> *Keith, Imperial Unity and the Dominions*, pp. 376 ff.

<sup>3</sup> *Cotton v. R.*, [1914] A. C. 176. The habit of delivering one judgement only

but the Quebec onslaught was decidedly lacking in courtesy, much more so than the far better justified Irish retort of 1926. In Ontario the Progressive or Farmers' Government, under the influence of Mr. Raney,<sup>1</sup> the Attorney-General, made an effort to secure the abolition of the appeal, but it was not even possible to secure the passing of a Bill, and in any case the measure would have been *ultra vires*, as appears clearly from *Toronto Railway v. City of Toronto*, where an appeal was allowed in the face of a Provincial Act declaring that no appeal lay from the decision of the Appellate Division.

In certain classes of cases the Privy Council does not exercise its right to admit appeals, especially in election petitions,<sup>2</sup> an example followed by the High Court of the Commonwealth. Nor is it usual to allow appeals from decisions of special Courts appointed for trials of persons accused of treason or sedition, as in the case of the Act No. 8 of 1908 of Natal setting up a special Court for the trial of Dinizulu.<sup>3</sup> But from other civil special tribunals appeals will be allowed.<sup>4</sup>

The decisions of the Privy Council are, of course, so long as the law is not altered by legislation, binding on the Courts below in any similar matters. But a dubious point arises as to the judgements of the English Court of Appeal and of the House of Lords. It has been held by Anglin J. in *Stuart v. Bank of Montreal*<sup>5</sup> that the Supreme Court of Canada will follow the House of Lords and overrule if necessary a prior decision of its own on that ground. That view has been rejected by the Court of Appeal of Manitoba in *Pacific Lumber Co. v. Imperial &c. Trading Co.*,<sup>6</sup> and also by the British Columbia Court<sup>7</sup> and in makes for blunders. For the amending Acts 4 Geo. V, cc. 9, 10, see *Alley v. Barthe*, [1922] 1 A. C. 215.

<sup>1</sup> *Canadian Nationality*, pp. 5, 6; Keith, J. C. L. ii. 331 f., [1920] A. C. 446.

<sup>2</sup> *Théberge v. Laundry* (1877), 2 App. Cas. 102; *Holmes v. Angwin*, 4 C. L. R. 297. For a land case (Tasmania 22 Vict. No. 10), see *Moses v. Parker*, [1896] A. C. 245.

<sup>3</sup> *Tshingumuzi v. A.-G. for Natal*, [1908] A. C. 248.

<sup>4</sup> *Reg. v. Demers*, [1900] A. C. 103 (Quebec petition of right); *In re Robert Barbour*, 12 N. S. W. L. R. 90; *Toronto R. Co. v. Toronto City*, [1920] A. C. 426 (Board of Railway Commissioners of Canada). Cf. *Canadian Pacific R. Co. v. Toronto Corporation*, [1911] A. C. 461; 30 N. Z. L. R. 530.

<sup>5</sup> 41 S. C. R. 516, 548.

<sup>6</sup> [1917] 1 W. W. R. 507, 508.

<sup>7</sup> *Chilliwack Evaporating Co. v. Chung*, [1918] W. W. R. 870; *Trumbell v. Trumbell*, [1919] 2 W. W. R. 198.

Ontario,<sup>1</sup> and the matter is still open to doubt. In the case of the decisions of the English Court of Appeal Anglin J. left the matter open. The case is clear enough, though it has been misunderstood. In *Trimble v. Hill*<sup>2</sup> on appeal from New South Wales the Privy Council laid down the quite sound rule that, where a Colony had adopted verbatim an English Act, and that Act had been interpreted by the Court of Appeal—the argument applies, of course, with still greater force to the House of Lords—the Colonial Court should accept the doctrine laid down by the Court of Appeal. This has occasionally been interpreted as indicating a general rule of following the Court of Appeal decision, but for this there is no warrant.<sup>3</sup> Naturally due regard will be had to the decisions of so excellent a tribunal, but they are not binding, and when they differ from the views of the Privy Council have no value.

Otherwise the rules in the Dominions accord in general with those in the United Kingdom. Curiously enough, Ontario legislates<sup>4</sup> to provide by law an obligation which elsewhere is allowed to rest on usage. It provides that the decision of a Divisional Court is binding on all Divisional and other Courts of Justice and shall not be departed from without the concurrence of the judges who gave the decision, while any judge of the High Court Division must follow a prior known decision of any judge of that Court. An interesting question might arise if it were attempted to hold that these enactments prevented the Courts giving effect to Privy Council rulings in subsequent cases overruling earlier judgements normally binding on the Court, but it cannot be supposed that anything so absurd would be held. In the case of decisions *at nisi prius* the rule in Canada<sup>5</sup> seems clearly to accord judges the right to disregard them if they are satisfied that they are not correct.<sup>6</sup>

<sup>1</sup> *Slater v. Laboree* (1905), 10 O. L. R. 648.

<sup>2</sup> 5 App. Cas. 542.

<sup>3</sup> 4 *Can. Bar. Review*, 404 f.; *Paradis v. The Queen* (1887), 1 Ex. C. R. 191, 193; *Manitoba Bridge and Iron Works v. Minnedosa Power Co.*, [1917] 1 W. W. R. 731, 738.

<sup>4</sup> *Judicature Act*, R. S. O. 1914, c. 34, s. 32.

<sup>5</sup> *Williams*, 4 *Can. Bar Review*, 301.

<sup>6</sup> As to the distinction of *dicta* and *ratio decidendi*, see *Davidson & Co. v. Officer*, [1918] A. C. 304, 322, *per* Lord Dunedin; *New South Wales Tax Commrs. v. Palmer*, [1907] A. C. 179, 184; *Membery v. G. W. R.* (1889), 14 App. Cas. 179, 187.



### § 2. *The Limitation of the Prerogative*

The only limitations by law on the right to grant leave to appeal exist in the case of the Commonwealth and the Union of South Africa. In the former case the limitation was agreed to by the Imperial Government only after a distinct conflict of opinion with the delegates from Australia who sought the passage of the Constitution through the Imperial Parliament. The final result<sup>1</sup> was to forbid any appeal to the Crown in Council 'from a decision of the High Court upon any question howsoever arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council'. In other cases an appeal was to lie by special leave; Parliament might by Act limit the cases in which appeal would lie, but such a measure must be reserved, and in point of fact legislation of this sort has not been proposed. Lord Russell of Killowen pointed out that, as there would still be a direct appeal from the State Courts, there might arise a conflict of judgements, and that the Privy Council view might well be deemed not binding by the High Court, but, with singular lack of foresight, Lord Alverstone, Lord Selborne, and Sir R. Finlay denied the possibility of this. The matter soon rose in practice. In *Deakin v. Webb*<sup>2</sup> and *Lyne v. Webb* the High Court, then dominated by American constitutional precedent, ruled that a State could not tax a federal minister's salary, and refused leave to appeal to the Privy Council on the score that the decision might be upset, and, as O'Connor J. put it, it was the duty of the Court, if it anticipated that the Privy Council would decide an important principle in the sense which the Court thought wrong, to refuse the means of obtaining such a decision. But in *Webb v. Outtrim*<sup>3</sup> the Victorian Supreme Court,<sup>4</sup> dutifully following the High Court, ruled that the tax was not applicable, but gave leave to appeal to the Privy Council under the Order

<sup>1</sup> *Commonwealth of Australia Constitution Bill* (1900); Keith, *Journ. Soc. Comp. Leg.*, ix. 269-80; *Parl. Pap.*, Cd. 158, 188.

<sup>2</sup> 1 C. L. R. 585, overruling *In re Income Tax Acts*, 29 V. L. R. 748.

<sup>3</sup> [1907] A. C. 81; *Wollaston's Case*, 28 V. L. R. 357.

<sup>4</sup> [1905] V. R. L. 463.

in Council of 9 June 1860. This right was questioned on the score that the *Judiciary Act*, 1903, of the Commonwealth had made the exercise of jurisdiction in such cases a federal matter, and had given authority to the State Courts to deal with it only under the rule that the sole appeal lay to the High Court. On the other hand, both the Victorian Court and the Privy Council ruled that the Order in Council was applicable to any jurisdiction, be it federal or otherwise, which the Court lawfully possessed, and, hearing the appeal, the Privy Council allowed it. But the High Court declined to be bound by that decision in *Baxter v. Commissioners of Taxation, New South Wales*.<sup>1</sup> It held by a majority that the Privy Council should have regarded itself as bound by the judgement of the High Court, but Higgins J. dissented, holding that the Privy Council stood on a higher platform, though in one class of cases the High Court could cut off access to that platform, pointing out that the Court for Crown Cases Reserved always followed the Lords, though no appeal lay from the one to the other.<sup>2</sup> The High Court also held that the Privy Council should have ruled that the Order in Council did not apply to federal jurisdiction, and that they would not be doing their duty if they sent a constitutional issue of this kind to the Council. A request for leave to appeal<sup>3</sup> was refused by that body, because *inter alia* the Commonwealth by Act No. 7 of 1907 authorized the levy of income tax at non-differential rates on Commonwealth salaries, and there was no concrete issue to face. The Commonwealth, however, very sensibly removed further difficulty by using the power under s. 77 (2) of the Constitution to define how far the jurisdiction of any Federal Court shall be exclusive of that of a State Court. It simply excluded by Act No. 8 of 1907 the Supreme Court of any State deciding any question as to the constitutional powers *inter se* of the Commonwealth and a State or States or of two or more States, whether on first instance or on appeal. When such a point arises, the case is *ipso facto* transferred to the High Court. Thus an appeal on such an issue can never come to the Privy Council from the State Courts.<sup>4</sup>

<sup>1</sup> 4 C. L. R. 1087. See also *Parl. Pap.*, Cd. 5273, pp. 39, 40.

<sup>2</sup> 4 C. L. R., at pp. 1162, 1163. Contrast pp. 1100-1, 1103, 1117 f., *per* Griffith C.J., Barton and O'Connor JJ.

<sup>3</sup> 5 C. L. R. 398 ; [1908] A. C. 214.

<sup>4</sup> 35 C. L. R. 69.

No exception was taken to this arrangement by the Imperial Government, as it was manifestly *intra vires*, and intervention would merely have caused more ill-feeling than already existed. It was, of course, true that the Privy Council might legally permit an appeal from an inferior Court to itself, but the improbability of such action was regarded as so great in the Commonwealth that no effort was made to prevent it. It remains for the Privy Council in each case to decide finally whether a case does fall within the limits of the constitutional restriction, but the Privy Council has shown no desire to raise fine points on that score. An effort by the States—the failure of which was foretold by the writer without result<sup>1</sup>—was ignominiously defeated after prolonged and costly argument before the Council,<sup>2</sup> their Lordships not even wasting the time of the counsel for the defendants, so clear to them as to the writer seemed the untenability of the contention of the States, which was not pressed in the earlier case of *Jones v. Commonwealth Court of Conciliation and Arbitration*.<sup>3</sup>

The few cases in which the High Court has certified have not added to regard in the Commonwealth for the Council, but the fact remains that the doctrines of the Council have at last won real acceptance<sup>4</sup> in the Commonwealth, which under the influence of a change of personnel in the Bench has ceased to interpret the Constitution in the light of the Conventions of the American Constitution, but treats it instead as an Imperial Act, subject to the normal principles of statutory interpretation.

An attempted restriction as to divorce appeals in New Zealand in the Act of 1912 was repealed as *ultra vires* by Act No. 69 of 1913.<sup>5</sup>

<sup>1</sup> Keith, *J. C. L.* iv. 107 f. In vain was this point pressed on the Attorney-General for Victoria.

<sup>2</sup> *Minister for Trading Concerns v. Amalgamated Society of Engineers*, [1923] A. C. 170. See also 35 C. L. R. 69; 37 C. L. R. 393.

<sup>3</sup> For refusal, see *Murray v. Collector*, 1 C. L. R. 32; *Municipal Council of Sydney v. The Commonwealth*, 1 C. L. R. 202, 237; *Deakin v. Webb*, 1 C. L. R. 585, 622, 626, 631; *Amalgamated Society of Engineers, Ltd. v. Adelaide Steamship Co.*, 29 C. L. R. 406. For grant see *Colonial Sugar Refining Co. v. A.-G. for the Commonwealth* (1912), 15 C. L. R. 182. The Privy Council decides if an appeal lies; *A.-G. for N. S. Wales v. Collector of Customs*, [1909] A. C. 345 (a bad report); *Jones' Case*, 24 C. L. R. 346.

<sup>4</sup> *Amalgamated Society of Engineers v. Adelaide Steamship Co.* (1920), 28 C. L. R. 129.

<sup>5</sup> For Canada, see p. 1087.

In the case of the Union of South Africa<sup>1</sup> the restriction is simple. In the first place no appeal at all rises from inferior Courts, but only from decisions of the Appellate Division of the Supreme Court, and no appeal lies as of right, save in the case of appeals under the *Colonial Courts of Admiralty Act*, 1890, which is not in fact a true exception, the jurisdiction thus exercised being really Imperial jurisdiction delegated to a Colonial Court.

In the case of the Irish Free State it is clear from the Constitution that appeals from the High Court to the Supreme Court may be barred by Parliament save as regards constitutional cases, involving the interpretation of the Constitution.<sup>2</sup> From the Supreme Court alone according to the Constitution may appeals be brought by special leave. It may be noted that this limitation is foreign to the scheme of the Canadian Constitution, which under the Treaty of 1921 is the model for the Irish Constitution, and it may be that the limitation on the Constitution is *ultra vires*, but it is most improbable that the Privy Council, which mingles political wisdom with legal interpretation, would hold so inconvenient a doctrine, and one which would merely result in legislative reversal of the Court's findings, where legislation was possible.<sup>3</sup>

### § 3. *The Constitution and Future of the Judicial Committee*

The Judicial Committee of the Privy Council, as constituted under the Act of 1833 and later Acts, essentially consists of all Privy Councillors who hold or have held high judicial office, including, of course, past and present Lord Chancellors; past and present Lords Presidents of the Council; two Privy Councillors specially designated by the Crown—distinguished lawyers like Syed Ameer Ali or Mr. Asquith; and paid Indian judges, with a facultative representation of Dominion judges. The latter was first provided for by an Act of 1895,<sup>4</sup> which allowed such members of the highest tribunals of Canada and the Provinces, the Australian and South African Colonies, but not Newfound-

<sup>1</sup> 9 Edw. VII, c. 9, s. 106.

<sup>2</sup> Keith, *J. C. L.* iv. 233 f.

<sup>3</sup> This mode of action was pointed out by me to Mr. D. Figgis as solving any problem in this regard without efforts to evade the Treaty.

<sup>4</sup> 58 & 59 Vict. c. 44. Cf. Walker, *Lord de Villiers*, pp. 116 ff. The agitation began in earnest in 1888.

land, who were Privy Councillors to sit on the Judicial Committee up to a total of five. In 1908,<sup>1</sup> after the Colonial Conference of 1907, this power was extended to include any judge of the High Court of the Commonwealth or of the Supreme Court of Newfoundland and of the Transvaal and Orange River Colony. It also authorized the use of the services as assessor of any judge of the Court from which an appeal was being brought, or of a Court of Appeal from that Court. In 1911 the Imperial Government, which desired the appointment of two more Lords of Appeal, induced the Imperial Conference, which had not the slightest interest in the proposal, to agree to it, and then insisted on their adherents, who disliked the needless expenditure, voting for the change on the score that the Dominions desired it, though had any person troubled to refer to the debates the absurdity of the assertion would have been manifest. The Act (3 & 4 Geo. V, c. 21) also increased to seven the number of Dominion judges who as Privy Councillors might sit on the Committee, and authorized the Crown in Council to arrange the membership in the event of there being more Privy Councillors than places. The chief result of this Act was the decision of the New Zealand Government<sup>2</sup> to send Sir Joshua Williams to sit regularly on the Council with residence in London and remuneration from the Dominion. All other Dominion judges had been merely temporary visitors, Canada and the Union having been willing to furnish funds for their judges thus to sit from time to time, while the Commonwealth was not prepared to do so, and Newfoundland never had a Privy Councillor among its judges.

The presence of at least three Councillors is requisite, under an Act of 1851, exclusive of the Lord President, for the determination of any appeal, and the decision of the Court, which is couched in the form of advice to the sovereign, is unanimous in form under an Order in Council of 4 February 1878 repeating an Order of 22 February 1627; the proposal of 1911 to alter

<sup>1</sup> 8 Edw. VII, c. 51. It provided also for two Indian judges (cf. 34 & 35 Vict. c. 70, which gave power to appoint but not a continuing power). Further steps in this regard were mooted in 1926, when adequate salaries were proposed to secure a stronger representation of Indian judicial experience.

<sup>2</sup> As to its Legislative Council, cf. *Cons. Stat.*, 1908, No. 101, s. 5. For New South Wales, Act No. 32 of 1902, s. 20; Queensland formerly by 31 Vict. No. 38, s. 24.

this practice was unwise, was repented of by Canada, and ultimately dropped generally. Under the Act of 1908 the old practice of making an annual order referring appeals to the Judicial Committee has yielded to a single order at the beginning of each reign. But in certain cases, such as those of special reference for the removal of a Colonial judge, it is usual to have others than members of the Judicial Committee present, the matter being one of more than judicial consequence. Connected with the Committee, but not identic in formation, are the Committees provided for the affairs of the Universities of Oxford and Cambridge and the Scottish Universities.

The functions of the Judicial Committee include, besides appeals from the Dominions, Colonies, Protectorates, Courts exercising jurisdiction under the Foreign Jurisdiction Acts, Indian Courts, Courts of the Isle of Man and the Channel Islands, appeals in matters of prize and in all ecclesiastical causes, as well as appeals in a number of minor matters such as the appointments of Councillors in New Zealand and New South Wales and appeals under the *Colonial Courts of Admiralty Act*, 1890. Other minor functions, such as those under the older *Patent Acts* of 1883 and 1902, have been conferred on the Comptroller of Patents. On the other hand s. 4 of the *Copyright Act*, 1911, gives to the Judicial Committee the duty of deciding as to the grant of compulsory licences in respect of a work after the death of the author. The *Endowed Schools Acts*, 1869 and 1873, provide for appeals from schemes for such schools, and the *Union of Benefices Act*, 1860, invokes the intervention of the Council in certain cases, but this matter is now capable of disposal under the new Church legislation system. The Privy Council is not rigidly bound to follow its earlier judgements; it can, if necessary, on fuller consideration overrule an earlier principle if adopted without adequate grounds.<sup>1</sup> It is not bound by the decisions of the House of Lords, though there have not yet occurred any very serious divergences of view, still less by those of the Court of Appeal, from which it has differed distinctly. On the other hand, the English Courts are in no wise bound by

<sup>1</sup> Cf. *Ridsdale v. Clifton*, 2 P. D. 276; *Read v. Bishop of Lincoln*, [1892] A. C. 644. Or it can explain away; cf. *Russell v. The Queen*, 7 App. Cas. 829, with *Toronto Electric Commrs. v. Snider*, [1925] A. C. 396; *Dominion of Canada v. Province of Ontario*, [1910] A. C. 637, as against 14 App. Cas. 46.

its views, though both the House of Lords and the Court of Appeal for their part, and the Privy Council for its part, show deference to the views of the other.<sup>1</sup>

The existence of two distinct Courts of Appeal for the different parts of the Empire has naturally elicited attention, and during the debate on the Commonwealth Constitution in 1900 Mr. Haldane suggested that the dislike of the appeal might be removed, if the Judicial Committee could be strengthened. A conference to consider this issue met in London in 1901,<sup>2</sup> when Mr. Justice Hodges submitted, in respect of Australia, a suggestion for an Imperial Court of Final Appeal in which would be merged the judicial functions of the House of Lords and of the Privy Council. The Court would consist of the members of the Lords in its judicial aspect and of the Privy Council, with the addition of permanent members, one each from India, Canada and Newfoundland, South Africa, and Australia and New Zealand. The proposal, however, evoked no general response. In 1907 Mr. Deakin<sup>3</sup> renewed the Commonwealth suggestion of one Court, pointing out that only four judges sat on *Webb v. Outtrim*,<sup>4</sup> that Australian opinion preferred the House of Lords, and was not satisfied with the Privy Council decision of the income tax cases. Dr. Jameson acquiesced in this view after being assured by Mr. Deakin that he expected to find Colonial judges on the final Court he contemplated. General Botha was concerned only with a final Court in South Africa, and Sir W. Laurier merely suggested that the composition of the Court was faulty, and that there was some objection to any appeals, and certainly to any by special leave. Sir J. Ward wished the presence of an assessor to keep the Council right on points of New Zealand land law, which was a painful subject in that Colony, where the Council had caused considerable difficulty by its allegedly erroneous decision of a Maori land case.<sup>5</sup> The Lord Chancellor could only say that British opinion was not

<sup>1</sup> *Victorian Railway Comm. v. Coultas*, 13 App. Cas. 222; *Pugh v. L. B. & S. C. R. Co.*, [1896] 2 Q. B. 248; *Janvier v. Sweeney*, [1919] 2 K. B. 316; *Leask v. Scott* (1877), 2 Q. B. D. 376; *Smith v. Brown* (1871), L. R. 6 Q. B. 736; *Lindsay Petroleum Co. v. Hurd* (1871), L. R. 5 P. C. 221, 243.

<sup>2</sup> *Parl. Pap.*, Cd. 846; *Hansard*, ser. 4, lxxxv. 271.

<sup>3</sup> *Parl. Pap.*, Cd. 3523, pp. 200 ff.

<sup>4</sup> [1907] A. C. 81.

<sup>5</sup> *Wallis v. Solicitor-General of New Zealand*, [1903] A. C. 173. See also *Ewart, Kingdom of Canada*, pp. 235 ff.; *Clark, Austr. Const. Law*, pp. 335-57.

ripe for any change as to the House of Lords—the truth being that he and the vast majority of lawyers held that Colonial judges were not good enough to sit on British appeals, but he agreed to meet the views of New Zealand as to assessors, the Act of 1908 above referred to being passed in accordance with this suggestion. In 1911<sup>1</sup> the discussion was again started by a resolution of Australia in favour of the merger of the Lords and the Council, but the Lord Chancellor was obdurate. Instead, he offered a nominal scheme of regarding the two as branches of an Imperial Court of Appeal, of increasing the quorum in both cases to five, and allowing the Council to deliver minority views. New Zealand pressed for Dominion representation by permanent judges, and was in effect reminded that this was possible under the existing law, if the Government were prepared to provide a salary. Australia, the Union, and Newfoundland were not prepared to send over judges, and Canada regarded the matter as affecting too closely the Provinces to be susceptible of proper treatment at the Conference. The only result of the Conference was that the Imperial Government secured the appointment of two further Lords of Appeal on the allegation of the Dominion desires, which were neither expressed nor entertained; that New Zealand sent and paid for a permanent judge until his death; and that the proposal for separate judgements was dropped.

In 1918, after the war efforts had proved the right of the Dominions to an equal share in Imperial affairs, Mr. Hughes reopened the question at the War Conference.<sup>2</sup> He proposed a single Court of Appeal for the Empire, composed of the Lord Chancellor; persons who had held certain high judicial offices; and representatives of India, the Dominions, and the Colonies. Those to represent the Dominions should be chosen after consultation with the Dominion Governments, but without any formal arrangement; the salaries should be Imperial, and the best men for the work to be dealt with should be sought, so that the Dominions would in practice enjoy the same degree of representation as Scotland or Ireland. The proposal was cold-shouldered; the Lord Chancellor saw many difficulties, not

<sup>1</sup> *Parl. Pap.*, Cd. 5745, pp. 214 ff. The effect of the Conference is misunderstood by Walker, *Lord de Villiers*, p. 495.

<sup>2</sup> *Parl. Pap.*, Cd. 9177, pp. 210 f., 243 f.



liking to say that he would not have Colonial judges in the House of Lords ; Sir R. Borden admitted that Canada would not mind seeing the appeal abolished, though he did not press the matter ; Mr. Hughes hinted plainly that abolition had patrons in Australia, and that his suggestion was planned to save the appeal. South Africa, India, and Newfoundland were happy to let things be, and the Conference ended in a statement to the effect that the Imperial Government might circularize the Dominions with any proposals it could offer.

The argument for a single Court is unquestionably strong. The present system does mean the inferiority of the status of the Dominions, for the Privy Council does not rank in importance with the House of Lords, and, if there are many cases to be heard, it is the Council which has the poorer judges allotted to it. The prejudice in the minds of English lawyers—the existence of which is undeniable by any honest person—against the competence of Dominion judges is unjustifiable. If they are not of the calibre of the best English, Scottish, and Irish judges, they are often manifestly superior to those of the British judges whose position is due merely to political talents, not legal skill. Moreover, an adoption of Lord Haldane's proposal<sup>1</sup> for dividing the Court of Appeal on this basis into panels, one of which might visit a Dominion from time to time to hear appeals, offers one solution of the objection to the taking of appeals overseas, with all that it implies of separation and resort to a foreign tribunal. The objections made by conservative lawyers<sup>2</sup> to his suggestion merely indicates the hopeless narrow-mindedness generated by Colonial circumstances in many minds.

In the absence of an Imperial Court the ultimate fate of the appeal cannot be in doubt, though the issue may be delayed. It is idle to deny that the taking of appeals to the Privy Council is a mark of inferior status and partial servitude ; the appeal was forced by threat of breach of negotiations and a formal war on the Irish Free State as part of the settlement of 1921-2. Respect is due in this regard to the effective means taken in the Free State to nullify the effect of the appeal where possible by altering the law, so that the appeal cannot effectively be decided.

<sup>1</sup> Compare Keith, *Imperial Unity and the Dominions*, pp. 384 ff.

<sup>2</sup> e. g., Sir J. Symon, *J. C. L.* iv. 137 ff.

In Canada the appeal is undoubtedly popular with the majority of lawyers, partly because there is still in the Dominion a certain fondness<sup>1</sup> for the status of Colonial dependence with its assurance of protection; partly because the appeal is not merely a source of great profit personally but brings them into contact with the busy life of the capital of the Empire. Opposition to the appeal is mainly visible in men like Messrs. Ewart and Raney and the late Sir W. Meredith, who feel that the time is past when a great Dominion should accept the position of dependency. The French Canadian attitude is naturally one of support for the Privy Council, except when it overrides Quebec Acts, when it can be abused with truly Gallic vivacity. It is believed in Quebec that the best security for the autonomy of the province and for the maintenance of its language rights lies in the Privy Council, and many Canadians who recognize the difficulty of status hold it is better to maintain the appeal in view of racial questions, comparing such external references as those of independent States to the Hague tribunal or the Permanent Court of International Justice. The same argument is occasionally adduced as regards the Union, but it has much less value, for the Union Constitution admits of easy alteration, and contrasts, therefore, decisively with the rigid Dominion Constitution. Moreover, the fact that in the Commonwealth constitutional appeals have been in effect barred, and that Australia is satisfied with the state of affairs, proves that there is no inherent necessity for having appeals even on such issues decided outside the Commonwealth. But, if these issues are discarded, it passes the wit of man to see what purpose is served by having appeals on ordinary matters of law decided in England.<sup>2</sup> That a suppliant should be at liberty to beg the

<sup>1</sup> Seen in the acceptance by Mr. Meighen of responsibility for Lord Byng's refusal to dissolve Parliament on Mr. King's advice, and the approval of many Canadian Colonials.

<sup>2</sup> Can it seriously be said that appeals were desirable in the Union cases, *Marshall's Syndicate Ltd. v. Johannesburg Consol. Investment Co.*, [1920] A. C. 421; *Minister of Railways v. Summer & Jack Prop. Mines Ltd.*, [1918] A. C. 591; *B. S. A. Co. v. Lennox Ltd.*, 85 L. J. P. C. 111; *Indian Immigr. Trust Board of Natal v. Govindsamy*, [1921] A. C. 423; *Madrasa Anjuman Islamia of Kholwad v. Mun. Council. Johannesburg*, [1922] 1 A. C. 500; or the Canadian cases, *Fournier v. Canadian National Railway Co.* (1926), 42 T. L. R. 629; *Letang v. Ottawa Electric Railway Co.*, *ibid.*, 596? If local judges cannot settle

King to do him justice which the Dominion Courts have refused to him, far from being an idea likely to bind together the Empire, is one calculated to stamp the Dominion Courts as inferior and vicious, while in practice it means that wealthy litigants have a very unfair advantage over poor suitors. The claim, still idly repeated, of advantage in securing uniformity of law is tedious ; in two matters alone is the Privy Council of importance in this regard, namely in interpreting the prerogative, a subject on which Dominion Courts are not always effective—though in one case at least<sup>1</sup> the Privy Council seems to have erred badly—and in enforcing the supremacy of Imperial over Colonial legislation. Otherwise uniformity of interpretation is impossible and undesirable ; the common law is at the base of the law of the Dominions other than the Union and Quebec, but it has been vitally changed by local legislation, and the tendency to assume that English law is applicable has been alleged with some justice to have obscured the views of the Council in certain New Zealand land cases.

The matter, however, is essentially one of national feeling and status. The existence of a true Imperial Court would remove all difficulty on this score, while the maintenance of the present position is just and proper as long as the Dominions desire to remain dependencies. But to talk of free and autonomous nations and equal partners in the Empire under these circumstances is childish folly. It is interesting to note that the Imperial Conference of 1926, despite its definite assertion of the autonomy of the Dominions, proceeded to decline to interfere with the appeal, despite the wishes of the Irish Free State, on the specious ground that its abolition there would react on the position elsewhere, i. e. would offend feeling in Quebec.<sup>2</sup>

It must also be remembered that on the whole the Privy Council is not quite so effective a Court as the House of Lords. That body by its habit of delivering competitive judgements eliminates largely the probability of error in fact, and there is

such cases, they must indeed be incompetent. See also the just criticism in *Williams v. Curator of Intestate Estates*, 8 C. L. R. 760, 761, *per* Griffith C.J., of decisions arrived at on new points not raised below, and therefore not discussed.

<sup>1</sup> *Bonanza Creek Gold Mining Co. v. The King*, [1916] 1 A. C. 566. See, last, Hodgins J.A., Ontario, in 4 *Can. Bar Review*, 86 ff.

<sup>2</sup> See Part VIII, chap. iii, § 8.

less chance of a decision on an important subject being left to a rather scratch crew. It is difficult to deny that the decision of the House of Lords in *London Joint Stock Bank v. Macmillan*,<sup>1</sup> which asserts that a customer owes a duty to a bank not to be negligent by leaving blanks in a cheque which can be filled in by a forger, is preferable to the ruling of the Privy Council in *Colonial Bank of Australia v. Marshall*.<sup>2</sup> Moreover, in *Casdagli v. Casdagli*,<sup>3</sup> the House of Lords affirmed the perfectly sound doctrine that a European can acquire a domicile in Egypt, which would have appeared impossible if the dicta of the Privy Council in *Abd-ul-Messih v. Farra*<sup>4</sup> had been sound. It is much more often possible to assert with conviction that a decision of the Privy Council contains unsound matter than to claim this of a decision of the House of Lords. A clear case is the misapprehension of the term 'veto' in the judgement *In re Initiative and Referendum Act*<sup>5</sup> of Manitoba; the decision in *Cotton v. R.*<sup>6</sup> in part turned on a clear misstatement of the law of Quebec; the famous ruling on *Bonanza Creek Gold Mining Co. v. The King*<sup>7</sup> seems to have rested on the quite false belief that Lieutenant-Governors of Canadian provinces possessed a general delegation of the prerogative right to issue charters conferring on corporate bodies the capacity of natural persons, a view for which there is absolutely no evidence, the fact being that, when it was proposed to issue such charters, special authority was conveyed to the Lieutenant-Governors. The two decisions of the Privy Council as regards the rights of minorities in Manitoba regarding education<sup>8</sup> may be reconciled, but not very easily, and it is difficult to resist the view, widely held in Canada,<sup>9</sup> that one or other was badly handled. The decision *In re Southern Rhodesia*<sup>10</sup> which saddled the Crown with an obligation to repay administrative deficits to the British South Africa Company is extremely difficult to follow, and its denial of any rights to the natives is disquieting; indeed, the decisions<sup>11</sup> of the Privy Council in extending the claim to deny natives any rights against the Crown are of very doubtful soundness and suggest an excessive

<sup>1</sup> [1918] A. C. 777.<sup>2</sup> [1906] A. C. 559.<sup>3</sup> [1919] A. C. 145.<sup>4</sup> 13 App. Cas. 341.<sup>5</sup> [1919] A. C. 935.<sup>6</sup> [1914] A. C. 176.<sup>7</sup> [1916] 1 A. C. 566.<sup>8</sup> See above, p. 538.<sup>9</sup> Skelton, *Sir Wilfrid Laurier*, i. 452 f., 459.<sup>10</sup> [1919] A. C. 211.<sup>11</sup> *Sobhuza II v. Miller* (1926), 42 T. L. R. 446.

reverence of prerogative. The finest exposition of the rights of the subject, that in the *De Keyser's Royal Hotel* case,<sup>1</sup> is due to the House of Lords, and the principle involved in it is irreconcilable with the view taken of the prerogative in the *Bonanza Creek Gold Mining Co.* case.

#### § 4. *Special References to the Privy Council*

Under s. 4 of the *Judicial Committee Act*, 1833, the King in Council may refer any matters other than appeals to the Judicial Committee for advice, and the Council is bound to advise him. One regular use of the power is to refer to the Council any issue as to the removal of a Colonial judge, either on the request for his removal by the Legislature,<sup>2</sup> or in the event of his suspension by the Governor in Council.<sup>3</sup> The boundary between Manitoba and Ontario was thus settled on reference,<sup>4</sup> and the Newfoundland claim as against Quebec to Labrador was similarly referred and heard in November 1926, though that of Victoria and South Australia was dealt with in the High Court of the Commonwealth and thence on appeal to the Committee.<sup>5</sup> The rival rights of the Bishops of Capetown and Natal were adjudicated on under reference,<sup>6</sup> though it was made clear that the matter could have been treated as an appeal, despite the contention that, as the action of the Bishop of Capetown was a mere nullity, no appeal could lie. A reference in 1886<sup>7</sup> decided the powers of the two Houses of Queensland as to Money Bills. The very complex issue of ownership of Rhodesian lands was disposed of in 1918, though in a very unsatisfactory manner, by the Council,<sup>8</sup> which unfortunately applied conceptions of

<sup>1</sup> [1920] A. C. 508 ; 526 f., *per* Lord Dunedin ; 539, *per* Lord Atkinson ; 552 ff., *per* Lord Moulton ; 561, *per* Lord Sumner ; 575 ff., *per* Lord Parmoor.

<sup>2</sup> Cf. *Sanderson's Case*, 6 Moo. P. C. 38.

<sup>3</sup> Cf. *Yelverton's Case*, [1893] A. C. 138. The Privy Council asserted their right to pronounce on this case. Mr. Cook in 1892 and Mr. Walker in 1908 so were removed. For the case of Onslow C.J., see Battye, *Western Australia*, pp. 345 ff.

<sup>4</sup> Ontario *Sess. Pap.*, 1885, No. 8 ; Canada *Sess. Pap.*, 1885, No. 123 b ; Imperial Act, 52 & 53 Vict. c. 28 ; Houston, *Const. Doc. of Canada*, pp. 276 f.

<sup>5</sup> *South Australia v. Victoria*, 12 C. L. R. 667.

<sup>6</sup> 3 Moo. P. C. (N. S.) 115.

<sup>7</sup> *Parl. Pap.*, C. 4794 ; H. L. 214, 1894. Contrast New Zealand in 1872, when the law officers advised ; *Const. and Gov. of New Zealand*, pp. 195 ff.

<sup>8</sup> [1919] A. C. 211.

private law and agency to governmental affairs with manifestly unjust results. More important and very valuable was the decision of the Council in 1924<sup>1</sup> on reference as to the position of the Imperial Government under the Treaty of 1921 with the Irish Free State, in view of the refusal of Northern Ireland to appoint an arbitrator under the agreement for the delimitation of the Irish boundary.

Occasions in which reference has been refused are not rare. Mr. Higinbotham's proposal that the Council should adjudicate on the dispute between the judges and the Ministry as to correspondence in 1865 was referred merely to the law officers, and not even their agreement with his views mitigated the indignation of Mr. Higinbotham at the outrage.<sup>2</sup> In 1872<sup>3</sup> the Council itself refused to consider the question of the New Brunswick educational legislation, which was impugned as contrary to the intention of the *British North America Act*. The President pointed out that the issue might come up on appeal, and, therefore, should not be dealt with on reference, and he also pointed out that the provincial Government had not assented to the reference. In 1878<sup>4</sup> the Imperial Government refused the request of Quebec for the reference to the Council of the question of the right of the Governor-General to remove a Lieutenant-Governor, because, there being no agreement on the part of Canada to the reference, the decision would not be binding, and, therefore, ought not to be given. In 1885<sup>5</sup> the Canadian Government negatived the proposal of the Imperial Government to refer to the Council the dispute between the Dominion and British Columbia as to the carrying out of the terms of union.<sup>6</sup>

<sup>1</sup> *Parl. Pap.*, Cmd. 2214; see also Cmd. 2155, 2166, 2264; 14 & 15 Geo. V, c. 41.

<sup>2</sup> See *Victoria Parl. Pap.*, 1864-5, B. 34, C. 2; 1866, Sess. 2, C. 8.

<sup>3</sup> Cf. *Parl. Pap.*, C. 2445, p. 121. The Government of Queensland in 1921 protested on this ground against a reference to the Council as to the validity of the Bill to abolish the Legislative Council.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Canada Sess. Pap.*, 1885, No. 34.

<sup>6</sup> For other cases of reference, cf. *In re Wallace* (1886), L. R. 1 P. C. 283; *In re Pollard* (1867), L. R. 2 P. C. 106; *MacDermott v. Judges of British Guiana*, *ibid.*, 341; *In re Ramsay*, 3 P. C. 427; *Emerson v. Judges of Supreme Court of Newfoundland*, 8 Moo. P. C. 157; *Smith v. Justices of Sierra Leone*, 7 Moo P. C. 174 (cases of relations of attorneys and justices); *A.-G. of Queensland v. Gibbon* (1887), 12 App. Cas. 442 (vacation of seat in Legislative Council, Queensland; see 31 Vict. No. 38, s. 24); *Gloete v. Reg.*, 8 Moo. P. C. 484

On the analogy of this power of reference Canada, as has been noted, has adopted widely the right of reference; the decisions are not binding on the Court in future concrete cases, but appeals to the Privy Council are not forbidden, and the Privy Council, though reluctant to admit such appeals, has definitely decided that the legislation authorizing references is valid<sup>1</sup> and that it itself will not refuse to do its best to deal with appeals, though it often avoids pronouncements on particularly interesting and complex issues. In the Commonwealth, as has been seen, it has been ruled that it is not the duty of the High Court to answer abstract questions.<sup>2</sup> The utility of the system in Canada is sufficiently seen by the value of the Privy Council's view on the power of the Dominion to legislate as to marriages,<sup>3</sup> which calmed a vehement controversy in 1909-11 on the score of the *Ne temere* decree. Valuable also have been its pronouncements on fisheries,<sup>4</sup> less so those on liquor<sup>5</sup> and companies.<sup>6</sup>

By an interesting innovation the Government in Northern Ireland can obtain a decision as to the validity of any legislation under the powers of the Parliament on reference to the Council,<sup>7</sup> although appeals lie to the House of Lords. It would be interesting if a real clash of views should thus arise.

This aspect of the Council's work has naturally invited the suggestion of the writer<sup>8</sup> that the Council should be freely used in disputes between parts of the Empire, which in the case of independent nations would result in reference to an arbitral

(removal of recorder under Natal Ord. No. 14 of 1845); *Malta Marriage Case*, *Parl. Pap.*, Cd. 7982.

<sup>1</sup> *A.-G. for Ontario v. A.-G. for Canada*, [1912] A. C. 571. In 1922 the Dominion legislated to allow appeals to the Supreme Court on the replies of provincial Courts to hypothetical questions put to them under local Acts. Hitherto an appeal in such cases had lain only to the Privy Council.

<sup>2</sup> Cf. *Bruce v. Commonwealth Trade Marks Label Assoc.*, 4 C. L. R. 1569 (refusal to decide validity of Part VII of the *Trade Marks Act*, 1905); *In re Judiciary Act* (1921), 29 C. L. R. 257 (Part XII of the *Judiciary Act* 1903-19 is invalid).

<sup>3</sup> *In re Marriage Legislation in Canada*, [1912] A. C. 880.

<sup>4</sup> *A.-G. for the Dominion v. A.-G.'s for the Provinces*, [1898] A. C. 700; *A.-G. for British Columbia v. A.-G. for Canada*, [1912] A. C. 153.

<sup>5</sup> *A.-G. for Ontario v. A.-G. for the Dominion*, [1896] A. C. 348.

<sup>6</sup> *Bonanza Creek Gold Mining Co. v. The King*, [1916] 1 A. C. 566.

<sup>7</sup> 10 & 11 Geo. V, c. 67, s. 51.

<sup>8</sup> *Imperial Unity and the Dominions*, pp. 165 f., 388.

tribunal, e. g. the propriety of the deportation of British subjects from the Union in 1914 without due process of law, or the confiscatory legislation of Queensland in 1920. The suggestion then formally made to the Colonial Secretary was not given effect to, though it is understood that Lord Milner did not negative the possibility of such a development of the functions of the Council, which, of course, could easily be constituted in such a manner as to secure real impartiality.<sup>1</sup> It was an object of special care to secure that the tribunal which dealt with the Irish boundary issue contained an Australian and a Canadian judge, thus giving the decision a truly Imperial aspect.<sup>2</sup>

<sup>1</sup> Keith, *War Government of the Dominions*, p. 261. Disputes as to Dominion trustee stocks could thus be adjusted, for the power of disallowance is obsolescent (cf. p. 770, n. 1).

<sup>2</sup> The Act of 1915 (c. 92) permits the Committee to sit in more than one division at a time, a useful preparation for a possible merger.



## IV

### THE PREROGATIVE OF MERCY

#### § 1. *The Prerogative up to 1878*

THE prerogative of mercy is a high prerogative, regularly delegated to Governors, but formerly on certain definite conditions as to its exercise. It is undecided whether it would have passed without delegation as an essential part of executive government. No doubt it could be barred by local Act,<sup>1</sup> and it is probable that such barring would prevent pardon by the King himself having any validity, though it has been contended in the case of the grant of leave to appeal that a Colonial Act cannot bar action in England.<sup>2</sup> It is not affected by local Acts providing for systems of remissions of sentence on good conduct, for it is supplementary to these, whether the prerogative is saved or not by such Acts, and, if it is to be barred, express words would be necessary. Under Crown Colony rule the power of the Governor to remit pecuniary penalties was often limited to the sum of £50 or £100, these being sources of revenue and, therefore, under control. With responsible government this restriction vanished, and the general scheme may be illustrated from the Commission and Instructions to the Governor of New South Wales, of 23 February 1872.<sup>3</sup> By the commission he was given power to grant a pardon, free or subject to lawful conditions, to any offender condemned by a Court, and to remit fines or forfeitures due to the Crown, and also to pardon accomplices who gave information. The instructions singled out the case of death sentences for special treatment; the Governor was to obtain a report from the judge, submit it to the Executive Council when the judge might be asked to attend, and decide, after taking the Council's advice, on his deliberate judgement, but under obligation to enter a note of his reasons if he differed from the Council.

<sup>1</sup> *A.-G. for Canada v. A.-G. of Ontario*, 23 S. C. R. 458, 469, *per* Strong C.J., as against 20 O. R. 222, 255, *per* Boyd J.; 19 O. A. R. 31, 39, *per* Burton J.A.

<sup>2</sup> Wheeler, *Confed. Law*, pp. 34 ff.; cf. *Nadan v. The King* (1926), 42 T. L. R. 356; A. C. 482.

<sup>3</sup> *Parl. Pap.*, C. 1202, p. 57.

The position under these and the earlier similar instruments was vague. In 1869 Lord Belmore raised the matter in New South Wales. It appeared that it had been the custom for the Governor to deal with all ordinary cases personally without using the Council. On 4 October 1869<sup>1</sup> the Colonial Secretary ruled that the Governor had the right to use his own judgement, but that the views of ministers were of great weight, unless some Imperial interest were involved, as in a case of treason, or slave trading, or of some foreigner being involved. The same doctrine appeared in a circular of 1 November 1871,<sup>2</sup> and in a dispatch of 17 February 1873 to the Governor of New South Wales, where Sir A. Stephen had questioned the practice.<sup>3</sup>

On 30 May 1874, Mr. H. Parkes returned to the subject in an able minute in which he made clear his position. He preferred that in the existing condition of Colonial society the Governor should bear the whole responsibility, but if that were not to be the case, then the usual rule must follow; if the Governor did not accept advice, he must find other advisers. On 29 June the Governor forwarded the paper to the Secretary of State, and adopted definitely the attitude that the matter must be made ministerial: 'In the present constitutional state it is obvious that as regards all purely local matters ministers must be trusted "all in all, or not at all".' All cases, therefore, would, by agreement with the Ministry and the approval of Parliament, be submitted with advice, when the Governor would decide if any Imperial interest were involved. Resignation on refusal of advice was a possibility, but in fact Ministers did not necessarily resign whenever their advice on some minor matter was rejected. New Zealand and Victoria had the system he was adopting; in Queensland, South Australia, and Tasmania the matter actually came before the Council on the motion of the Minister. Mr. Parkes's objection to ministerial responsibility he rejected, because Parliament would never approve it, and already accusations of sectarian prejudice and official corruption had been levelled at himself. The Secretary of State, however, did not agree with the Governor save in a general way.<sup>4</sup>

<sup>1</sup> *Ibid.*, p. 1.

<sup>2</sup> *Ibid.*, p. 3. Cf. Parkes, *Fifty Years of Australian History*, i. 329-46.

<sup>3</sup> *Ibid.*, p. 7. Cf. *Hansard*, ser. 3, ccxxiii. 1065-75.

<sup>4</sup> *Parl. Pap.*, C. 1202, p. 47. So again in May, 1875; C. 1248, pp. 6, 7:

He reminded him that he was analogous to the Home Secretary in the United Kingdom, being personally entrusted with the high prerogative, and that his duty of consulting ministers was to be combined with his duty of considering Imperial interests, and with the further duty of using his deliberate judgement generally and not merely in capital cases. He also pointed out that the case which really caused most trouble, that of the bush-ranger Gardiner, raised an Imperial issue, for he was to be pardoned on condition of exile, and this practice, which was legal under 11 Vict. c. 34, was obviously objectionable to neighbouring colonies, the rest of the Empire, and foreign countries, so that he had learned with satisfaction that the Act would be repealed as regards this power.<sup>1</sup>

In 1877 a dispute arose in Tasmania<sup>2</sup> because the Governor on ministerial advice pardoned Louisa Hunt. Both Houses disapproved, and the judges claimed that the Governor was seeking to act as a Court of Appeal from the Courts. The Colonial Secretary on 29 October 1877 laid down quite clearly that the action in granting a pardon was in no sense a review of the Courts, but a pure act of royal clemency, and he definitely disapproved the proposal that judges should be asked to submit notes officially; if consulted informally, they would doubtless help with advice.

Canada was under the same system as Australia. In 1861 the Governor-General pardoned one Patterson against ministerial advice.<sup>3</sup> In 1875 Lepine was granted by Lord Dufferin a commutation to two years of the death sentence for the murder of Scott, ministers being consulted, but the Governor-General acting on his own responsibility with subsequent approval by the Colonial Secretary.<sup>4</sup> In 1877 the Governor-General in Council consulted the Imperial Government in regard to Martin's case.<sup>5</sup>

### § 2. *The Views of Mr. Blake in 1876*

In preparing the new permanent letters patent regarding the office of Governor-General the correspondence with New South the Governor must consult, weigh Imperial interests and ministerial advice, but must decide as he thought right.

<sup>1</sup> See Act No. 17 of 1883. Victoria had a similar Act, No. 233.

<sup>2</sup> *Leg. Council Papers*, 1878, No. 36; 1878-9, Nos. 117, 118.

<sup>3</sup> *Quebec Morning Chronicle*, 7 Sept. 1861.

<sup>4</sup> *Commons Deb.*, 1875, pp. 21 ff., 36 ff.; cf. O'Donoghue's case, 1877, pp. 1405 ff.

<sup>5</sup> *Canada Sess. Pap.*, 1879, No. 181.

Wales was sent to Canada, and elicited a discussion by Mr. Blake, who with his usual accuracy placed the whole matter in the most effective light.<sup>1</sup> He interpreted the documents correctly as an effort to insist on a personal responsibility of the Governor which ran counter to principle. There was, he contended, no ground on which the responsibility of decision should not be placed on ministers in respect of this, as of every other act of government. The arguments from undue pressure on ministers and the danger of their yielding improperly to such pressure were dismissed as inapplicable to Dominion conditions, where the Ministry was already held responsible for the prerogative by public opinion ; difficulties might arise as in all matters of government, but they would best be solved by unflinching application of constitutional principles. He readily admitted that there might be cases where the Governor-General had to consider Imperial issues, e. g. the proposal to banish a convict, the treatment of a foreigner, political offenders or offenders tried under Imperial Acts, but these were cases on a parallel with other instances in which, as Canada admitted, Canada might not be deemed to possess full self-government, and they must be left apart. The Secretary of State was, however, unwilling to omit as desired all reference to the special character of pardons, but he agreed to put nothing in the letters patent, and to have in the instructions only the grant of the power to pardon ; the provision that banishment should not be imposed as a condition of a pardon ; and the requirement that the Governor-General should receive in capital cases the advice of the Privy Council, in other cases that of a minister, and that, where the matter directly affected the interests of the Empire or of any country or place beyond Dominion jurisdiction, he should take these interests specially into his own personal consideration together with the advice tendered to him.

In matters where no Imperial interest is concerned the Governor-General's intervention is thus compelled merely when the Council is, as in Shortis's case,<sup>2</sup> equally divided.

<sup>1</sup> *Canada Sess. Pap.*, 1876, No. 116 ; 1877, No. 13 ; 1879, No. 81.

<sup>2</sup> *Commons Deb.*, 1896, Sess. 1, pp. 827 ff., 7171 ff. ; Sess. 2, p. 2279 ; 32 Can. L. J. 237. For the usual practice, see *Commons Deb.*, 1908, pp. 2915 ff.

### § 3. *The Discussion at the Conference of 1887*

At this Conference<sup>1</sup> the matter was raised by Sir F. D. Bell, who held that the ordinary rule of ministerial responsibility should be extended to pardons. He was supported by Mr. Deakin, who desired the adoption of the Canadian plan, and Mr. Service, both speaking as Victorians. New South Wales, in which the Governor had acted independently in the famous Wantabadgery case in 1885,<sup>2</sup> desired no change, nor did Tasmania. Sir S. Griffith held that the situation was anomalous, but still under existing circumstances it was better to have an impartial officer, though, he added, the Ministry must take the responsibility for his decision—a rather absurd point of view. He held also that the instruction to the Governor to record his views if he went counter to the majority of his Council was unsound, as the Council should be treated *vis-à-vis* the Governor as a unit with one mind, a perfectly legitimate criticism. Mr. Service also mentioned that in 1884 Mr. Higinbotham,<sup>3</sup> then Chief Justice, had refused to answer any summons to a meeting save from the Executive Council. Newfoundland preferred the responsibility to stay with the Governor; Sir W. Fitzherbert of New Zealand thought issues of life and death should be kept out of politics; and in view of the utter divergence of view nothing was agreed to.

### § 4. *The Change of 1892*

Very shortly after the Conference the need of an alteration of view was forced on the Colonial Secretary. Not only did Mr. Higinbotham address a heated but logical argument to Lord Knutsford, as a distinguished gentleman interested in Colonial affairs, but Sir T. McIlwraith, on the Governor of Queensland, Sir A. Musgrave, refusing to accept his advice on one case, resigned, and the Governor had to yield, as he could find no other Ministry. Lord Knutsford on 30 October 1888 admitted that the Governor had acted within his rights, but held that he would have done well to subordinate his view to that of his Ministry.<sup>4</sup> In point of fact the case was badly handled

<sup>1</sup> *Parl. Pap.*, C. 5091, pp. 545 ff.

<sup>2</sup> *Parl. Deb.*, 1885–6, p. 311. Contrast Lord Carrington in the Mount Rennie case; Parkes, *Fifty Years*, ii. 177; *Deb.*, 1911, p. 1296. <sup>3</sup> Morris, *Memoir*, p. 200.

<sup>4</sup> *Queensland Ass. Votes*, 1889, i. 601; Bernays, *Queensland Politics*, pp. 116 ff. Worry over the episode hastened the Governor's death.

by Lord Knutsford and Sir A. Musgrave alike, for the case which arose was not under the prerogative but under the *Probation of Offenders Act*, 1886, and no real question of the Governor's discretion arose under this statutory power. This defeat of the Governor was followed up in New Zealand.<sup>1</sup> Lord Onslow reported on 7 February 1891 that his Ministers held, in connexion with the pardon of a Maori, Mahi Kai, whose sentence for murder was commuted to life imprisonment, that their advice should be formally tendered and formally acted on under the ordinary rule of constitutional government. Lord Onslow held that the time had come when the rule should be adopted; the social conditions referred to by Mr. Parkes in 1874 had passed away in New Zealand; ministers were now able to take responsibility; as it was, deputations waited on the Governor; he was accused of being biased by religious or class prejudice, and counsel for the prisoner tried to turn him into a Court of Appeal from the judiciary. The old convention as to ministers allowing the Governor to act independently had broken down in Queensland and now in New Zealand—South Australia in the same year denounced it, the Government threatening to resign—and it would be sufficient in every case to adopt the rule of action on ministerial advice, unless the Governor were willing to change his ministers, subject, of course, to the reservation of cases affecting the Empire or foreign countries. The Secretary of State consulted the Colonies in Australia, and, on their agreement with the new view, fresh documents were issued adopting the rules laid down for Canada, and requiring only personal consideration of matters affecting the Empire or foreign countries.

On the issue of the position of ministers, when the Governor refused to act as advised because of some Imperial interest, there was the usual confusion of thought. Mr. Ballance in his memorandum on the power of pardon insisted that in every case the Governor must find other ministers if he declined advice, thus negating the doctrine definitely laid down by Lord Carnarvon on 4 May 1875<sup>2</sup> that, if the Governor acted under Imperial instructions, ministers ought not to feel either obliged or entitled to retire, seeing that they were not responsible for

<sup>1</sup> *Parl. Pap.*, 1891, Sess. 2, A. 1, pp. 5, 6, 19, 20.

<sup>2</sup> *Parl. Pap.*, C. 1248, p. 7; *Canada Sess. Pap.*, 1876, No. 116, p. 82.

the failure of their advice and need only answer to the Legislature for the actual advice given. But next year,<sup>1</sup> under Lord Glasgow, the Ballance Government changed entirely its attitude when the matter involved was the Governor's refusal to add members to the Council, insisting that they were entitled to remain in office and appeal to the Secretary of State for a ruling. There is no doubt that this was the wiser view.

Under the new procedure ordinary cases are disposed of on the advice of one Minister, capital cases on that of the Executive Council. The change may be illustrated from South Australian practice ; before 1892 the Governor discussed a capital sentence in Council, taking the views of the junior member first ; after the new letters patent and instructions he receives the papers with an intimation of the advice of the Cabinet, and formally approves it in Council as with other business. In Tasmania in 1908<sup>2</sup> a rather confused case arose ; a man was sentenced to death, and the Council, without calling on the judge to attend, though receiving the usual report from him, decided not to interfere in the sentence. The decision was unpopular, executions being almost unknown, and an agitation among the public forced the reconsideration of the case, when the judge was summoned and the sentence commuted. An attack was nevertheless made in the Assembly but not pressed. The Governor, however, pointed out to Ministers formally that in such cases the full responsibility as to procedure was now theirs, and that in New Zealand<sup>3</sup> the presence of a judge was not required. It was, however, the normal practice in Australia to have the judge present, and to consult him on legal points, though normally at least he made no recommendation. In 1909<sup>4</sup> efforts were made by the Opposition in Parliament in Western Australia to secure a reprieve for a murderess, but the Government stood firm, the Governor again pointing out that the decision lay in their hands, no Imperial interest arising. In 1910<sup>5</sup> the Labour Government of New South Wales by their

<sup>1</sup> *Parl. Pap.*, H. C. 198, 1893-4, p. 19.

<sup>2</sup> *Hobart Mercury*, 20-22 Oct. 1908.

<sup>3</sup> *New Zealand Parl. Pap.*, 1893, A. 1, p. 12.

<sup>4</sup> *Parl. Deb.*, 1909, pp. 806 ff. ; *West Australian*, 6 Oct. 1909.

<sup>5</sup> *Parl. Deb.*, 1910, Sess. 2, pp. 41, 704 ; 1911, pp. 1295 ff., 1316 ff. ; *Sydney Bulletin*, 10 Aug. 1911. Cf. *South Australia, Counc. Deb.*, 1910, p. 450.

clemency to a murderer and to strike leaders excited bitter comment on the score that their action was dictated by pure expediency, as doubtless was the case, and in 1911 they sought to shelve responsibility by a Criminal Appeal Bill in which the judges were to consider all death sentences, the Executive to have no further responsibility. Queensland more sensibly determined to set the lead in Australia by abolishing a death penalty which was never carried out, and did so in 1922. Murders are not frequent but far from rare.<sup>1</sup>

No change was made in substance in the State letters patent and instructions on the advent of the Commonwealth; the Commonwealth in its turn was treated exactly as was Canada, the power to pardon and the conditions being expressed in the instructions and not the letters patent. The power is definitely restricted to offences against the laws of the Commonwealth, i. e. any Commonwealth common law or statutory law, as on defence, customs, quarantine, the post office, and so forth. If an action is a crime at common law in a State, or under the federal law, the power to pardon belongs constitutionally to the Governor-General or the Governor, according as the prosecution is federal or State, though in strict law a State Governor, who has power to pardon for any offence which may be tried within the State, might pardon even for an offence punished under Commonwealth law. He alone can pardon for offences tried under Imperial Acts. In Canada in 1905 the old wording<sup>2</sup> which allowed the Governor-General to pardon provincial offences, deliberately inserted at first by the Imperial Government, which refused to accept the desire of the Quebec Conference for the grant of the pardoning power in respect of provincial matters to the Lieutenant-Governors, was withdrawn. This should have been done much earlier, when it had been decided by the Supreme Court that the pardoning power could properly by Act be conferred on the heads of the provincial Executives. But, carelessly, the power to pardon in respect of offences under Imperial Acts was still omitted.

<sup>1</sup> The Victorian Supreme Court has held that a free pardon still leaves a man liable to be refused admission under a law to prevent the influx of criminals; *Ryall v. Kenealy*, 6 W. W. & A'B. (L.) 193, 206, 207.

<sup>2</sup> *Sess. Pap.*, 1869, No. 16. Before federation both the Governor-General and the Lieutenant-Governor of Upper Canada had delegation of the power.



§ 5. *The Prerogative in South Africa*

In the case of the Cape in 1872, and again on the issue of permanent letters patent in 1879, of Natal in 1893, and of the Transvaal and the Orange River Colony in 1906 and 1907, the older form was followed, and the Governor was given a general delegation in the letters patent with an instruction in the royal instructions to decide on his own deliberate judgement in cases of capital sentences, after consulting the Executive Council. But after the passing of the *Aliens Act* in the United Kingdom it was natural that the Cape Government should desire the right to banish aliens, and, as the Imperial Government had introduced the possibility of expulsion orders, it was agreed to modify the standing prohibition of the banishing of aliens by way of conditional pardons by providing that the restriction on banishment to cases of political offences unaccompanied by any other grave crime should be confined to cases of natural-born British subjects or persons naturalized in any part of the British dominions.

These precedents were followed in substance in the Union instructions of 1909, where the power of pardon is given generally, with the limitation that banishment can be made a condition of pardon if the offender is a natural-born or naturalized British subject only in the case of a political offence (the old limitation 'unaccompanied by any other grave crime' disappears). In a capital case the Governor-General still must act on his own deliberate judgement after consulting the Executive Council and the judge, whose presence may be secured if desired. The case of Imperial interests is thus never expressly referred to, but that does not mean that it is overlooked. It is simply that the old Australian rules apply, and under them the Governor was always bound to take into consideration Imperial interests in any and every case. In capital cases, however, there is more than that; the Governor-General must use his own judgement. The reason is mainly racial; the conflict of white, Indian, and black presents complexes in which in the interest of the Union and the Empire alike the cool deliberation of one who is not dependent on South African favour might be invaluable even to ministers, who thus can resist pressure. But it may be doubted if any Governor-General would now refuse advice.

In the case of Southern Rhodesia the form adopted is that of the Union, with the suitable qualification of a political offence as one unaccompanied by other grave crime.

§ 6. *The Prerogative in Newfoundland and Malta and Ireland*

In Newfoundland the old instruments remain unchanged. The letters patent give an absolutely general power, with an equally general prohibition of making a pardon conditional on banishment, even in the case of political offences or aliens. The instructions merely provide for the personal discretion of the Governor in the case of death sentences.<sup>1</sup> It was left, therefore, for constitutional practice to decide how the prerogative should be exercised, and up to the Governorship of Sir William Macgregor the matter was left in the hands of the Governor. He, however, induced ministers to accept responsibility, after a violent attack had been made on him for remitting a fine in respect of a technical breach of the game laws of the Colony. Doubtless, however, in a place like Newfoundland, ministers may be anxious to obtain the advice of the Governor in cases of difficulty. Formerly, of course, the treaty rights of American citizens and French subjects rendered it always possible that the Governor might have to exercise the prerogative on Imperial grounds, but the recent regulation of these rights diminished this necessity.

In the case of Malta the form adopted is that of Southern Rhodesia, banishment being permitted in the case of aliens generally, but only in respect of a political offence unaccompanied by other grave crime in the case of a natural-born or naturalized British subject.

In the case of Northern Ireland the system of the United Kingdom is adopted, under which the Minister is responsible for all decisions, and in the Irish Free State similarly the Governor-General is eliminated, though it may be ruled that if he desired he could exercise the same power as the Governor-General of the Dominion in view of the Treaty of 1921. In fact, it is obvious that no Court could hold invalid any pardon granted by him in the King's name.

In every case it must be remembered that the King has the right to pardon on the advice of Imperial ministers, but this

<sup>1</sup> Cf. *Cape Assembly Deb.*, 1907, pp. 100-2.

right could clearly not be exercised consistently with responsible government save through the Governor.

§ 7. *Amnesty, &c.*

No specific power is granted to Governors to offer an amnesty; this is simply carried out by notification that persons surrendering or dispersing will not be prosecuted; thus in 1865 the Governor of New Zealand announced that certain offenders would not be prosecuted, and in 1875<sup>1</sup> Lord Dufferin notified a similar immunity for participants in the Red River rising save Riel and Lepine, in whose case five years' banishment was provided; O'Donohue, who was omitted, was pardoned on a like condition on 22 November 1877. Or amnesty may be granted by Act of Parliament, as on various occasions in Canada and in New Zealand in 1882;<sup>2</sup> the most important case was that of the Union of South Africa at the close of the rebellion; definite promises of amnesty were made and all were redeemed by Act No. 11 of 1915,<sup>3</sup> which followed in some degree similar legislation in the Cape in 1900 in respect of the rising there during the Boer War, and there was much legislation in the Irish Free State.<sup>4</sup>

From 1871<sup>5</sup> the express power has been conferred to pardon an accomplice who gives information, thus covering the accomplice from the necessity of standing trial and then receiving a pardon. The power to remit penalties due to an informer is conferred by an Imperial Act of 1859,<sup>6</sup> but clearly could not be given by the prerogative. Hence when it was employed in Newfoundland in 1908 it was questioned in the press, and local legislation was duly passed in 1910 (c. 17) so to proceed, in accordance with the rule that the matter is one for local legislation.

<sup>1</sup> See *Canada Gazette*, 24 Apr. 1875; *Sess. Pap.*, 1878, No. 55.

<sup>2</sup> Act No. 4; Rusden, *New Zealand*, iii. 470. For Canada see 10 Vict. c. 116; 12 Vict. c. 13.

<sup>3</sup> Compare Union Act No. 1 of 1914 and Cape Act No. 6 of 1900.

<sup>4</sup> See the *Indemnity (British Military) Act*, No. 2 of 1923, for the benefit of persons acting under the British Government from 23 Apr. 1916 to 10 Feb. 1923—the former date is amusing; cf. *Indemnity Act*, No. 31 of 1923; No. 40 of 1924.

<sup>5</sup> *Parl. Pap.*, C. 1202, p. 4; New South Wales Letters Patent, 23 Feb. 1872, s. 6; New Zealand *Parl. Pap.*, 1872, A. 1a, pp. 10–12.

<sup>6</sup> 22 Vict. c. 32.

The Privy Council<sup>1</sup> has definitely ruled that the power to pardon extends to pardoning contempts of Court resulting in the committal of an offender to prison, a matter of importance, for it has been stated in the United Kingdom<sup>2</sup> that pardon is not available in the case of contempt of Irish Land Courts. This doctrine seems, however, to have been mainly due to the convenience of exonerating thus the Government from responsibility, and it would be interesting to see the validity of a royal pardon denied by any Court on such a ground. Unfortunately, Governments in these matters prefer to adhere to shirking responsibility.

Since 1878, on a suggestion of Mr. Blake's, power has been given to pardon offences triable, though not committed, in a Colony. This power was carelessly omitted from the Canadian instructions of 1905, through a literal following of the Commonwealth instructions of 1900 in forgetfulness that the two Constitutions differ vitally, and a similar blind following of the blind<sup>3</sup> resulted in denying the power to the Governor-General of the Union in 1910. When Imperial forces are within a Colony, it is not the practice of the Governor to exercise in respect of them the royal prerogative, though in law he could clearly do so.<sup>4</sup>

<sup>1</sup> In a Bahamas case, [1893] A. C. 138.

<sup>2</sup> *Hansard*, ser. 4, cxciii. 102.

<sup>3</sup> This neatly illustrates the numbing force of precedent on legal advisers. So the Queensland letters patent of 1925 (s. 9) assume the existence of the Legislative Council abolished in 1922, and the Cyprus letters patent (s. 9) try to override the *Colonial Laws Validity Act*, 1865.

<sup>4</sup> For his statutory powers, see *Army Act*, s. 54 (7) and (9).



PART VII  
THE CHURCH IN THE DOMINIONS



## THE CHURCH IN THE DOMINIONS

### § 1. *The Legal Position of the Church of England*

IN England the Church of England still remains in vital connexion with the State, a fact symbolized by the presence of the Bishops in the House of Lords, the apparatus of Ecclesiastical Courts from which an appeal lies to the Privy Council, State establishment, and, since 1919, the extraordinary power of legislation for its own affairs with the formal approval of Parliament possessed by the Church. In the Dominions the Church has gradually come to be dissociated wholly from the State, and the only two Churches which may be said to be in a sense established are the Roman Catholic Church in Quebec,<sup>1</sup> where it is permitted to exact by the civil authority its dues from all its followers, and the same Church in Malta, in which by the first Act passed after the grant of responsible government it was enacted that the 'Roman Catholic Apostolic religion is, as it has ever been in the past, the religion of Malta and its dependencies'.

The historical process by which this result has been achieved is interesting. It was manifestly difficult to hold that the English ecclesiastical law was carried into the Colonies, and, when in 1787 the first bishopric was set up in Nova Scotia, the jurisdiction conferred on the Bishop was not expressed to extend to any non-ecclesiastics, but it did empower him to visit, punish and correct, whether by removal, deprivation, suspension, or other ecclesiastical censure, all ecclesiastical persons in his diocese, and to inquire into their conduct by sworn witnesses. Another commission gave him like power in Quebec, New Brunswick, and Newfoundland; this bishopric was recognized in the Imperial Act of 1791 establishing representative government in the Canadas. In 1793 a bishopric of Quebec was founded and the Canadas removed from the juris-

<sup>1</sup> The Pope, of course, really governs the Church; cf. his marriage laws, *Canadian Annual Review*, 1908, p. 629. The right to appoint bishops doubtless once belonged to the Crown (Forsyth, *Cases and Opinions*, pp. 49-51), but the idea of using it dropped, and an alliance between State and Church substituted. See, e. g., Skelton, *Sir Wilfrid Laurier*, i. 82 ff., 120 ff.



diction of the Bishop of Nova Scotia. In 1819 these two bishoprics were recognized by an Imperial Act (c. 60) as enjoying ecclesiastical jurisdiction. In 1839 Newfoundland was given a bishopric, and Toronto was severed from Quebec, both with jurisdiction, and in 1845 a similar bishopric was created for New Brunswick.<sup>1</sup>

In Australia a bishopric was created in 1836, one in New Zealand in 1841 and in Tasmania<sup>2</sup> in 1842, and this last creation raised the question of the legality of the grant of powers in the usual form, for Baptists and Presbyterians alike took umbrage at the power to summon and swear witnesses. The matter was referred to the law officers, who reported that the coercive jurisdiction was invalid, and, accordingly, new letters patent in 1849 omitted the power to summon and swear witnesses, avoided conferring jurisdiction or the right to punish, and only authorized the bishop to visit the clergy, call them before him, and inquire into their conduct. This was the end as regards Australia of the issue of letters patent conferring jurisdiction as opposed to mere powers to visit; in 1847 the bishopric of Australia was split into four, Sydney, Newcastle, Melbourne, and Adelaide, the first of these bishops having metropolitan powers over the others and Tasmania; a bishopric was created at Perth in 1856, at Brisbane in 1859, and at Goulburn in 1863, all with powers of visitation alone. Similarly in New Zealand in 1856 and 1858 four new bishoprics were created, with the Bishop of New Zealand as metropolitan.

The lack of coercive jurisdiction was made good by legislation so far as essential. In New South Wales an early Act (8 Will. IV, No. 5, ss. 19, 20) had authorized the bishop to license clergy and deprive them of their licences for good cause, and this Act applied to Queensland as being passed before separation of the colonies. In 1854 Victoria, by Act No. 19, authorized the bishop, clergy, and laity of any diocese therein to meet and make regulations to enforce discipline; Tasmania, by Act 22 Vict. No. 20, made similar provision, and authorized the bishop to swear, though not to summon witnesses, while in South Australia the bishop and clergy entered into a consensual compact, establishing a synod and binding the clergy

<sup>1</sup> See *Parl. Pap.*, H. C. 276, 1855; 131, 1856; 476, 1866.

<sup>2</sup> Cf. Forsyth, *Cases and Opinions*, p. 52.

to observe its resolutions. Similarly in Canada an Act of 1856 (c. 141) authorized the bishops, clergy, and laity of the Church of England in Canada to meet in their dioceses and make regulations for the discipline of the Church, including the appointment and removal of its officers, and also to meet in synod to frame a general constitution for the good government of the Church. This Act was completed by one of 1859 (c. 139), and, at the request of the Church, a metropolitan was appointed by letters patent in 1860 and 1862, who was given not merely the power of presiding at the provincial councils, but also of exercising jurisdiction of his own, ousting that of the bishops. Complaints were naturally made that this was illegal, and the metropolitan was informed that the complaints were well founded, and that his office was subject to the Acts. In 1802 Prince Edward Island had established, by 43 Geo. III, c. 2, the Church of England,<sup>1</sup> and in 1758 Nova Scotia had done likewise. No coercive jurisdiction was conferred in the case of Montreal in 1850 or British Columbia in 1859, nor in the revised letters patent for Nova Scotia in 1858. But jurisdiction was still given in the case of Rupert's Land in 1849, and by mere inadvertence in those of Huron and Ontario in 1857 and 1862. The right to present to benefices was given to the Governor in the provinces by the letters patent and instructions, but the bishop was to institute. This was repeated for the Dominion in 1867, and the claim asserted in respect of New Brunswick in 1869, but the use of local legislation removed the difficulty.

In South Africa a Bishop of Capetown was created with powers of visitation only in 1847, when the Cape was still a Crown Colony; new letters patent were issued in 1853, after it had been given representative government, and bishoprics were erected at Graham's Town and Natal, the Bishop of Capetown being given metropolitan rank. It was in these circumstances that a series of judgements settled the legal position of the Church.<sup>2</sup> In *Long v. Bishop of Cape Town*<sup>3</sup> the Privy

<sup>1</sup> The position of dissenters was safeguarded. The Act was repealed by c. 18 in 1879. For Nova Scotia see *Rev. Stat.*, 1900, c. 109; Act 1911, c. 117; for New Brunswick, where it was never established, Hannay, i. 169 ff.

<sup>2</sup> Blachford, *Legal Development of the Colonial Episcopate*; Adderley, *Colonial Policy*, pp. 395 ff.; Forsyth, *Cases and Opinions*, chap. ii.

<sup>3</sup> 1 Moo. P. C. (N. S.) 411. Cf. *Ex parte King*, 2 Legge, 1307.

Council held that after the grant of representative institutions the Crown had no legislative power in the Cape, and, therefore, could confer neither religious nor civil jurisdiction by letters patent. It considered further whether the effort of the bishop to remove Mr. Long from his incumbency could be based on contract, and held that by his accepting a living under a deed contemplating removal for any lawful cause, he could be removed if such a cause existed. But it was ruled that, as the cause was the refusal of the clergyman to secure the election of a member of a synod summoned by the bishop, and as the bishop had no authority from the Crown or the Legislature to call such a body, the removal from office could not be held valid. It was ruled that, a civil right being involved, an appeal to the Civil Courts was perfectly valid. Next, *In re The Lord Bishop of Natal*<sup>1</sup> Dr. Colenso appealed to the Council from a sentence of deprivation pronounced on him by the Bishop of Capetown as his metropolitan. The Court held an appeal would lie; the King was head of the Church, and before the Reformation the Pope had jurisdiction over all disputes between prelates, and the King in England replaced the Pope; further, by 25 Henry VIII, c. 119, an appeal in ecclesiastical causes arising in any part of the royal dominions was given to the King in Chancery, whence arose the Commission of Delegates, superseded by the Judicial Committee under an Act of 1832. Further, the matter had been referred to the Council under s. 4 of the Judicial Committee Act of 1833, and on that ground could be heard. It also ruled that the sentence of deprivation was null and void, for the Crown had no prerogative to confer such jurisdiction after a colony had received legislative institutions, though it might do so where it had power to legislate for a conquered or ceded colony, or by statute, as that of 1843 for the Falkland Islands. In India, bishoprics at Calcutta, Madras, and Bombay had been established by statutory authority in 1813 and 1833, with necessary jurisdiction; one in Jamaica in 1824 had been confirmed by Colonial Act, and even in England the creation of new bishoprics had been done under statute. Moreover, to confer coercive jurisdiction was contrary to the repeal by 13 Car. I, c. 11, of s. 18 of 1 Eliz. c. 1, authorizing the

<sup>1</sup> 3 Moo. P. C. (N. S.) 115; cf. *Bishop of Cape Town v. Bishop of Natal*, L. R. 3 P. C. 1.

Crown to create such jurisdictions overseas, for that repeal had been expressly preserved by 13 Car. II, c. 12, which otherwise restored ecclesiastical jurisdiction. Nor could it be held that ecclesiastical law, unless specially introduced, was in force in a settled colony, so that, even if letters patent gave the bishop metropolitan rank, they could give no jurisdiction by reason of that rank. Spiritual authority might be inherent in the rank of metropolitan, but it could be transformed into civil power only by Imperial or local legislation. Further, it was impossible to find any basis of contract in the case, there being no actual agreement binding the prelates in question, whose relations were imposed solely by the supposed royal power. The judgement, it must be confessed, erred in fact; it treated Natal as having representative government, so that the Crown had no legislative authority left. In point of fact Natal was a Crown Colony, and without power to change its Constitution, so that, if the Crown had had no power to legislate, there could have been no change, while in point of fact the Crown did legislate in 1856 by bestowing a representative Constitution. It is, however, possible that, even if it had remembered this, the Council would have relied on the fact that the Bishop of Capetown was not subject to the power of the Crown to legislate for Natal, and, therefore, it was not competent to create effectively the metropolitan relationship.

This case was followed by the judgement of Romilly M.R. in *Bishop of Natal v. Gladstone*<sup>1</sup> that, whatever else might be the case, the Bishop was entitled to be paid his salary. He attempted there to make quite clear the distinction between a Church in a colony which was a real branch of the Church of England, and a Church which might be in full communion, but was not really a branch. His criterion rested on change in the form of appointment of bishops or ecclesiastical tribunals, and he endeavoured to make out that the Privy Council had admitted the possession of jurisdiction. The matter, however, was much better dealt with by the Privy Council itself in *Merriman v. Williams*,<sup>2</sup> where it was quite clearly laid down that it could not be ruled that Englishmen in the Colonies had ceased to be members of the Church of England merely because they elected their bishop, or had a different system of ecclesiastical courts,

<sup>1</sup> L. R. 3 Eq. 1.    <sup>2</sup> (1882) 7 App. Cas. 484; Walker, *Lord de Villiers*, pp. 178 f.

these being matters of necessity, as the ordinary Courts of the Church did not exist in the Colonies, but that in the case of South Africa the Church was not part of the Church of England because it refused to be bound by the Privy Council's determinations as to ecclesiastical law.

In *Ex parte Jenkins*<sup>1</sup> the discrepancy between the views of Lord Romilly and the Privy Council was noted, but the authority of the Bishop of Newfoundland in the Bermudas was held to be sufficiently validated by local Acts. In *Bishop of Natal v. Green*<sup>2</sup> the Colonial Court frankly held that the letters patent were valid and did confer jurisdiction, defeating Mr. Green's attempt to ignore his bishop on the strength of the view of the Privy Council, and the decision was not challenged. The law officers in April 1869, consulted as to the possibility of dealing with the bishop and his alleged heresies, admitted that the Colonial Court was probably right in its judgement; if it were, a *scire facias* would be unavailing to revoke his patent, since it assumed that the grant was improvident; the Archbishop had no jurisdiction to inquire into the bishop's views; the Crown was supreme in causes ecclesiastical and civil, but only by law in either case, and it could not appoint Commissioners, for the Court of High Commission had been pronounced illegal, and to refer the matter to the Privy Council under the Act of 1832 would be to set up the High Commission Court in another form. It is clear that the law officers overlooked an obvious test; if the trustees of the Colonial Bishoprics Fund, whence his salary was drawn, had refused to pay on the score of heresy, the matter might have incidentally been decided by the Court of Chancery or on appeal thence.

The decision of the Privy Council was decisive for the Crown. It might, if it chose, have given ecclesiastical jurisdiction in nearly all the Crown Colonies in virtue of its statutory<sup>3</sup> or prerogative authority, but it resolutely refrained from doing so, and it ceased to issue letters patent appointing Colonial bishops. In Natal it steadily refused to appoint any successor to Dr.

<sup>1</sup> 2 P. C. 258; cf. 3 P. C. 1, 13.

<sup>2</sup> 1868 N. L. R. 138. See *Campbell v. Hall*, 20 St. Tr. 239, for the rule that the Crown loses power to legislate only where the Legislature is representative.

<sup>3</sup> See 50 & 51 Vict. c. 54; 3 & 4 Will. IV, c. 85; 29 & 30 Vict. cc. 12, 115; 39 & 40 Vict. c. 47.

Colenso, and left it for the Church itself in all the self-governing Colonies to obtain from the local Legislatures such legal aid as they deemed desirable. The English Church in South Africa constituted itself the Church of the Province of South Africa in full communion with the Church of England and other Anglican communities ; its Provincial Synod decisions bind all members of the Church in South Africa, but it is prepared to accept the authority of the General Synod of the Church of the Anglican Communion, when that meets, and the General Consistory of the Lambeth Conference as its court of final appeal. It has twelve dioceses, including that of Natal, a bishop of the Church having been consecrated by the Archbishop of Canterbury in 1893. Similarly, in 1866, New South Wales provided itself with a Constitution, followed by Queensland and Western Australia in 1868 and 1872. In the latter year a synod of the Australian dioceses was agreed upon and remodelled in 1896. Since 1905 there have been three archbishops, the primate being elected by the bishops. Sir G. Grey helped to draft a Constitution for the Church of New Zealand,<sup>1</sup> which is in all matters of government autonomous, as of course is the Church of England in Canada. In all these cases the civil rights of the members of the Church are enforced by the Courts on the usual basis of the observance of pacts among members of voluntary associations.<sup>2</sup>

The consecration of these bishops in these Churches is entirely a matter for the Church itself, but consecration if desired by an archbishop in England requires the sanction of the Crown,<sup>3</sup> which has power to authorize consecration of bishops for service overseas within or without the British dominions. In other cases the Colonial bishops consecrated in this manner are full members of the Church of England in every sense, and

<sup>1</sup> Cf. Collier, *Sir George Grey*, p. 88 ; Rusden, ii. 256 ; Bishop of Wellington, *Guardian*, 11 Aug. 1875 ; Phillimore, *Eccl. Law*, II, x, chap. 3.

<sup>2</sup> For the litigation in Natal see *Board of Curators of Church of England v. Durban Corp.* (1900), 21 N. L. R. 22 ; *Moses Sibisi v. Curators*, *ibid.*, 90 ; Dilke, *Problems of Greater Britain*, ii. 418 ff. Act No. 9 of 1910 ended property disputes between the Churches, but recognized their distinction.

<sup>3</sup> No diocese is assigned for Colonial bishops ; see Lord Kimberley's decision on the Bishop of Sydney's request in 1872 ; *New Zealand Parl. Pap.*, 1872 A, 1a, p. 31 ; *Hansard*, ser. 3, clxxxvii. 256, 762 ; *Parl. Pap.* H. C. 259 II, p. 50 ; Adderley, *Colonial Policy*, pp. 395 ff. The style Lord Bishop is irregular ; *Parl. Pap.*, C. 3184, p. 7. Right Rev. is official.

the legal relations among members of such branches of the Church of England will be judged by the Courts by the principles of the Church of England proper.

The confusion arising as to the right of clergymen of these churches to officiate in England or to obtain preferment was removed after much discussion by a Bill introduced and carried by Lord Blachford in 1874<sup>1</sup> which makes adequately clear the position. He had proposed to deal with the property of the Churches in the Colonies, but that was more properly left for local legislation, which already in large measure existed.

When the Bishop of Nova Scotia was holding office under the old letters patent, the question was raised, in considering the proposal to create hereditary Upper Houses in the Canadas, whether the bishop could not be given a seat as in the case of the House of Lords, but the whole project fell to the ground, as being obviously out of place. He was, however, regularly summoned to the Legislative Council of Nova Scotia, and a bishop sat in the New Brunswick Council in 1825, while an effort of New Brunswick in 1852 to deprive him of the possibility of a seat was disallowed, as being an interference with the royal prerogative.<sup>2</sup> Bishops were also placed on the nominee Councils which marked the early days of constitutional government in Australia, and their precedence, though purely by courtesy and shared with Roman Catholic bishops, is one of the features showing their old status.<sup>3</sup>

### § 2. *The Position of other Churches*

The position of the Roman Catholic Church in Canada is of a most remarkable kind. Under the policy of favouring the French on the score of using them to repress the threatened rebellion<sup>4</sup> of the southern States, the Roman Catholic Church<sup>5</sup>

<sup>1</sup> *The Colonial Clergy Act, 1874*; *Hansard*, ser. 3, clxxxvii. 256, 762; ccxvi. 484; ccxlviii. 1804; *Parl. Pap.*, C. 979.

<sup>2</sup> Hannay, *New Brunswick*, i. 407; *Parl. Pap.*, H. C. 529, 1864, p. 35.

<sup>3</sup> For cases on civil rights, see *Gladstone v. Armstrong*, [1908] V. L. R. 454; *A.-G. v. Williams*, 7 S. R. (N.S.W.) 826; *Dunstan v. Houison*, 1 S. R. (N.S.W.) (Eq.) 212; *Fielding v. Houison*, 7 C. L. R. 393; *Lindley v. Jones*, 16 C. T. R. 695; *Public Trustee v. Commr. of Stamps*, 26 N. Z. L. R. 773.

<sup>4</sup> Cf. 14 Geo. III, c. 83, s. 5; 31 Geo. III, c. 31, s. 35.

<sup>5</sup> Cf. Dilke, *Problems of Greater Britain*, i. 79 ff.; Goldwin Smith, *Canada*, pp. 122 ff.; Galt, *Church and State*; David, *The Canadian Clergy*; Lindsey, *Rome in Canada*; Sellar, *The Tragedy of Quebec*; Willison, *Sir Wilfrid Laurier*, i. 53 ff., 253 ff.; ii. 40 ff.

received the most favourable consideration and was permitted to exact by law her dues from all Roman Catholics. Although the Crown had the legal right to appoint Roman Catholic bishops the power was never employed,<sup>1</sup> and more or less surreptitiously the Pope was permitted to exercise the full and complete control of his co-religionists in the Dominion. Education has been wholly controlled by the Church, and it has long distinguished itself by its excursions into politics, the priesthood enforcing a strict control over the people. In 1877<sup>2</sup> an election was declared void by the Supreme Court simply on the score of clerical influence, and that influence has been active in gradually removing from Quebec the settlements of Protestant farmers. In 1895-6 it was the fear of the clergy of Quebec which drove the Conservative Government to ruin in the effort to coerce Manitoba on the educational issue.<sup>3</sup> The priests worked hard to reward Sir C. Tupper by urging their parishioners to vote against Mr. Laurier, under threat of severe ecclesiastical censure. The defeat of their efforts did not endear him to them, though in 1896 he presented the humiliating spectacle of a Premier petitioning the Pope to approve his actions,<sup>4</sup> and in 1909-10 their objection to military service evinced itself in extreme hostility toward his naval projects, and their carrying against him elections in Drummond and Arthabaska. Great excitement prevailed in 1909, when the first Plenary Council was held there by command of the Pope, and in 1910 the Eucharistic Congress elicited great demonstrations, the Administrator, in the absence of the Governor-General at Hudson Bay, going out of his way to greet the Papal Legate, whose visit was honoured by the presence of soldiers in uniform, though the Government in the House of Commons was emphatic in repudiating any official character for the facts.<sup>5</sup> During the war the Church, unfortunately, was in the main antipathetic to any share in the dangers of the Empire. It must be remembered that France,

<sup>1</sup> Cf. *Parl. Pap.*, H. C. 94, 1838, pp. 71, 72.

<sup>2</sup> *Brassard v. Langevin*, 1 S. C. R. 145. See Skelton, *Sir Wilfrid Laurier*, i. 143 ff. Bishop Langevin actually pressed for the removal of Judge Casault from his Laval chair because he took part in the decision to annul an election at Bonaventure, where curés threatened to refuse the sacraments to Liberal voters. A mission of Mgr. Conroy in 1877 led to less immoderation of action.

<sup>3</sup> Skelton, i. 462 ff.

<sup>4</sup> *Ibid.*, ii. 37 f.

<sup>5</sup> Cf. *Canadian Annual Review*, 1907, pp. 408 f.; 1910, pp. 352, 358, 625.



owing to its lack of loyalty to the Pope, was not in deep favour with French Canadians, and the anti-British attitude of the Pope was a factor in creating hostility to recruiting. The war brought out also rather strongly the hostility of the French clergy to their Irish co-religionists ; in 1915 all English-speaking professors were removed from the Roman Catholic University at Ottawa, compelling English-speaking students to find instruction elsewhere.

Considerable excitement has at times been caused in Canada by the apparent power of the Pope to alter the civil laws of that province by religious decrees. But the difficulties have been due to misunderstandings of various kinds. It is perfectly clear from the decisions of the Privy Council<sup>1</sup> that the Roman Catholic Church in Canada owes all its position to positive legislation. The annexation converted it from being a privileged body, which refused to tolerate Protestantism, into a body which would have been illegal but for legislative protection. It is, of course, open to the Legislature of Quebec at any time to give effect to declarations of canon law on, for instance, marriage, by appropriate legislation, but the civil law of Quebec is not open to alteration in any other way. If a new impediment to marriage should be enacted by the Pope, or should an existing impediment be removed, the people of Quebec might very properly give legislative effect to it as far as concerns members of the Catholic Faith, but the edict of the Pope would not change the law. Only history ultimately will assign to the Church its share in the outstanding defects of the people of Quebec, their unwarlike disposition, their genius for political corruption, their subservience to unworthy leaders, their sadly defective speech, and their failure to produce a single great name in literature, art, or science. Its teachings assuredly have furthered the multiplication of the race and its persistence as a definite unit, attached to the British connexion as a safeguard against impairment of its religious privileges.

In the case of other Churches in Canada and the rest of the Dominions, and of the Roman Catholic Church outside Quebec and Malta, the legal position of these bodies is that of voluntary

<sup>1</sup> *Despatie v. Tremblay*, [1921] 1 A. C. 702 ; *In re Marriage Legislation in Canada*, [1912] A. C. 880. Cf. the burial case, *Brown v. Curé de Montréal*, L. R. 6 P. C. 157 ; Skelton, i. 100 f.

associations, whose arrangements are, therefore, subject to examination by Civil Courts whenever any civil interest is concerned.<sup>1</sup> The matter was carefully considered in *Macqueen v. Frackleton*,<sup>2</sup> where a dispute between a minister of the Presbyterian Church in Queensland and that Church as represented by its General Assembly arose. The Assembly suspended him from office, involving the dissolution of the pastoral tie and loss of emoluments, because he had brought an action against the Presbytery on the score that it had recommended the General Assembly to remove him from office. The ground of the Assembly's action was simple ; it was part of the minister's duty to engage to submit to the jurisdiction of the Courts of the Church, whose constitution had been recognized by a Colonial Act of 1900, and by issuing a writ he had violated his duty. The High Court on appeal ruled that the minister was entitled to bring his action, as the courts of law were always open to a man who desired to assert property rights, and that he could not be held to have surrendered his future destiny into the hands of an infallible General Assembly. The Chief Justice relied on the *Cardross*<sup>3</sup> case in support of this view. O'Connor J. also agreed, but admitted that it might have been agreed by the plaintiff in clear terms that, if he did not respect the agreement to accept the jurisdiction of the Courts, he should cease to enjoy the privilege of membership, but he did not think that any such agreement had ever been made. Isaacs J. was in agreement with the other members of the Court that the so-called Church Courts had no coercive jurisdiction at all, but he could see no difficulty in the view that, while a man might be at liberty to appeal to a court of law to determine his legal rights, it might be open for a communion to say that by so appealing he had by prior agreement forfeited his right to be a member of that body.

Legislative action by Dominions for local Churches is often essential on the score of property rights. The Dutch Reformed

<sup>1</sup> *Johnston v. Ministers, &c., of St. Andrew's Church, Montreal* (1878), 3 App. Cas. 159 ; *Alexandre v. Brassard*, [1895] A. C. 301 ; *Polushie v. Zacklynski*, 37 S. C. R. 177 ; [1908] A. C. 65 ; *Deeks v. Davidson*, 26 Gr. 488 ; *Murray v. Burgers*, L. R. 1 P. C. 362.

<sup>2</sup> (1909) 8 C. L. R. 673 Cf. *Tovey v. Howison*, 7 C. L. R. 393, 406.

<sup>3</sup> *McMillan v. Free Church of Scotland*, 22 D. 290.

Church in the Union of South Africa, with its elaborate constitution, partly federal, was given definitive form by a Union Act of 1911 replacing the former local Acts of the separate branches of the Church. In Canada in 1923 the movement of the creation of a United Church of Canada to gather together the Presbyterian, Methodist, and Congregational Churches of Canada came to a head, when resolutions were drawn up for a basis of union. In 1924 the taking of steps to obtain legislation in the provinces<sup>1</sup> and the Dominion led to conflicts and disunion, though the Bill was carried through the Dominion Parliament eventually in 1924, despite the doubts of the Prime Minister, after exhaustive examination in the Private Bills Committee. Fortunately, those Presbyterians who realized the folly of merging their Church with two alien denominations, without the same traditions and mainly motivated by considerations of their advantage, succeeded in retaining the right to preserve a Presbyterian Church of their own, leaving the new Church to consist in the main of Methodists and Congregationalists, and the less sincere and more mercenarily inclined Presbyterians, who were willing to sacrifice principles for ampler means. It is satisfactory to record that in most of the provinces due regard was shown to the necessity of not confiscating for the benefit of the new Church the whole property of the Presbyterians, but of leaving those who remained faithful to their beliefs a reasonable share of the property, following the model set by the Imperial Parliament<sup>2</sup> when it dealt with the situation caused by the fusion of the Free Church of Scotland with the United Presbyterian, and it became necessary by legislation to decide as to the endowments of the Free Church.<sup>3</sup>

A singular affair took place in Canada in 1888, when Mr. H. Mercier by an adroit manoeuvre secured episcopal sanction for

<sup>1</sup> See, e. g. Manitoba Act, c. 129; *Canadian Annual Review*, 1924-5, pp. 504 ff. A disgraceful attempt to prevent the use of the name Presbyterian by the continuing Church was foiled by the Dominion Secretary of State. It had, in 1925, 1,100 congregations and 153,000 members. Ontario in 1925 and 1926 and Quebec in 1926 recognized the claim of congregational minorities; *ibid.*, 1925-6, pp. 574 ff. <sup>2</sup> 5 Edw. VII, c. 12.

<sup>3</sup> Cf. *Bannatyne v. United Free Church of Scotland* (1902), 4 F. 1083; 7 F. (H. L.) 1; *United Free Church v. McIver*, 4 F. 1117; 7 F. (H. L.) 1. Cf. *Lyon's Trs. v. Aitken* (1904), 6 F. 608; *Free Church Assembly v. Johnston* (1905), 7 F. 517. See also Bennett, *L. Q. R.* xxxiv. 35 ff.

the passage of an Act in the Quebec Legislature<sup>1</sup> restoring to the Jesuits the properties which they had lost on the cession of Canada, either under the English law then introduced, or under the royal proclamation of 1791, suppressing the Order—already dissolved by Clement XIV in 1773—or by escheat in 1800, when the last member of the Order in Canada died. There was indignation in Ontario, but the federal Government declined, very properly, to disallow, being upheld on a vote of 188 to 13. Needless to say other religious orders flourish, and legal recognition is given to monastic vows and civil death.<sup>2</sup>

### § 3. *Church Endowments*

The question of Church endowments played a great part in early Canadian history. In the Act of 1791<sup>3</sup> it was expressly provided that of lands granted as nearly as possible one-seventh should be appropriated for the support and maintenance of a Protestant clergy. The Governor in Council of each province was authorized to establish in each township one or more parsonages or rectories of the English establishment, and to endow them with the lands thus appropriated. To these parsonages could be presented by royal authority clergymen of the Church of England, who would then have the same rights as the incumbent of an English parsonage. By s. 40 of the Act the spiritual jurisdiction and authority of the Bishop of Nova Scotia under the letters patent of 1787 were expressly saved. The Parliament could alter the provisions of the Act, but the measure must be laid before both Houses of the Imperial Parliament before assent, which must not be given if either House opposed it. A limited power of sale of such lands was given in 1827.<sup>4</sup> The Union Act of 1840<sup>5</sup> made a similar provision as to alterations of the law of 1791, but another Act<sup>6</sup> of the same year permitted the sale of the reserves, part of the proceeds to go to paying the stipends of existing clergy, forty-four rectories having been instituted by Sir J. Colborne in 1836, while of the

<sup>1</sup> Skelton, *Sir Wilfrid Laurier*, i. 351 ff.; Willison, i. 258 ff.; *Prov. Leg.*, 1867-95, pp. 407 ff. Macdonald, *Corr.*, pp. 440 ff., 452 f.

<sup>2</sup> *Parl. Pap.*, H. C. 385, 1877, C. 1828.

<sup>3</sup> 31 Geo. III, c. 31, ss. 36-42; Earl Grey, *Colonial Policy*, i. 253; Pope, *Sir John Macdonald*, i. 75 ff.; Hincks, *Rel. Endowments in Canada*.

<sup>4</sup> 7 & 8 Geo. IV, c. 62.

<sup>5</sup> 3 & 4 Vict. c. 35, s. 42.

<sup>6</sup> 3 & 4 Vict. c. 78.

residue half should go as an endowment of English and Scottish clergy and half to other Protestant denominations. Agitation continued, and in 1851 a Canadian Act (c. 175) took away the power to create and endow any more rectories, leaving the validity of the earlier endowments to be decided by the Courts, which next year declared them valid. In 1853 accordingly an Imperial Act authorized the Canadian Parliament to deal as it thought fit with the reserves and their proceeds, and an Act of 1854 (c. 2) secularized them. It is noteworthy that while Catholic hostility to the reserves and the Church of England was thus gratified, nothing was done to affect the right of Catholic priests to their dues under the Act of 1774. The other provinces were not troubled by similar difficulties of hostility to the Church. Gradually the idea of giving a Church a special position became distasteful, and Nova Scotia and Prince Edward Island rescinded their old legislation.

In Australia<sup>1</sup> reservations for religious purposes were made in the Constitution Acts of New South Wales and Victoria in 1855 and of Tasmania in 1854, but nothing was provided in South Australia, where there had always been no love of the Church of England, nor in Western Australia in 1890, when responsible government was accorded. Queensland had only a small appropriation. Even so, these amounts were not insisted on by the Imperial Government, nor did it demand their appropriation to any special denomination. In New South Wales the appropriation disappeared by Act No. 19 of 1862, after a struggle with the Council ; in Victoria the Council resisted until 1871 (No. 391). In Tasmania a first effort in 1859 to accomplish the abolition was disallowed, but it passed in 1868 (No. 30), when capital grants were made to each of the denominations which had shared in the grant of £15,000 a year. Queensland also in 1860 (No. 3) abandoned the grant, while neither in New Zealand nor in Newfoundland was any sum included in the civil lists or otherwise. In the Cape<sup>2</sup> a reservation was made in the Constitution of 1852, but the principle was attacked in 1856 on, and was terminated by Act No. 5 of 1875, while no such grants were included in the Natal Constitution, which ceased grants in 1869, nor in those of the Transvaal

<sup>1</sup> Earl Grey, ii. 335 ff.

<sup>2</sup> Walker, *Lord de Villiers*, p. 42.

or Orange River Colony, though there certain grants were made by the Legislature.

The situation in Northern Ireland and the Irish Free State is peculiar, because both these territories are bound not to support any religion from public funds nor to prejudice any person on religious grounds. In Malta the Constitution enunciates as fundamental the doctrines of liberty of conscience and the free exercise of religious worship, and provides that no person shall be subjected to any disability or excluded from holding any office by reason of his religious profession. This principle is not modified as regards free exercise of religion even by the proviso of public law and morality, but this, of course, is understood. The Constitution of Malta is silent on the score of religious education, it being assumed that the children of Maltese parents will be brought up in schools including the teaching of the Catholic faith, but in the case of Ireland there is a definite prohibition of differentiation as regards State aid between schools of different denominations, or prejudicing the right of a child to attend a school receiving public money without attending the religious instruction given at the school. In the case of Northern Ireland much feeling was caused by the mistaken policy of the Act of 1923, in which s. 26 provided that an education authority should not provide religious instruction in any public elementary school, while s. 66 (3) declared that an education authority should have no power to require that teachers appointed for any provided or transferred school should belong to, or profess the tenets of, any particular Church. The result of these unwise clauses, clearly unnecessary as they were, was that the private schools could not be transferred to the State, and the Government in 1925 had to come down with a Bill which made it clear that the system of religious instruction where desired by parents of pupils would go on as before. Further, the local schools committees were given advisory functions in selecting teachers for transferred schools, thus securing that the children were taught by duly qualified persons, and the offending clauses above cited were duly repealed. The Bill was gladly received by all concerned, seeing that it was manifestly just and merely preserved the *status quo* under the Commissioners of National Education, the Protestants asking nothing that was not equally open to Roman Catholics. What

was surprising was that no explanation was forthcoming of Lord Londonderry's curious policy of 1923, or the more amazing action of the Cabinet in so flouting public opinion. The change made saved the Government, which just then had successfully dissolved Parliament, from a serious difficulty.

In the Dominions there is purely secular education in New Zealand, efforts to introduce Bible teaching or some modified system having failed. In South Australia and Victoria the position is the same ; a referendum in 1896 in South Australia resulted in the negative ; a referendum in Victoria by Executive regulation had a similar result, and an effort of the Legislative Council to force a referendum was defeated by the Lower House in 1910, though the Ministry was divided in opinion. In Queensland, where Roman Catholic influence is specially strong, religious instruction in the schools was reintroduced by Act No. 5 of 1910 as the outcome of a referendum, against the wishes of the Government. In New South Wales, Tasmania, and Western Australia the State provides Christian but not denominational instruction, with right of entry for clergymen to give denominational instruction to those desirous of it. In Canada separate schools for Roman Catholics and Protestant are an essential feature in Ontario, Quebec, and to a modified extent in Manitoba, while provision is made for them by the Constitutions of Saskatchewan and Alberta. In Newfoundland the system of governmental grants to denominational schools prevails. In South Africa, on the other hand, the system is that of undenominational schools. In all public schools the school is opened by prayer and Bible reading. Teaching of Bible history subject to a conscience clause is generally permitted, but actual denominational teaching is allowed only in the Cape under Ordinance No. 18 of 1913.

The influence of religion on public life is a serious factor not merely in Ireland and Canada, but even in Australia. Feeling runs specially high in New South Wales, but is not unknown elsewhere, and during the war the influence of the Roman Catholic hierarchy was on the whole distinctly unfavourable to the aid of Australia being given to the Allies, and in favour of the Republican propaganda which helped to ruin recruiting. In 1924 an effort was made in New South Wales to counter the mischievous and malevolent action of persons who went about

alleging that those who, being Catholics, had not been married by a Catholic priest, were as a result of the *Ne temere* decree not lawfully married. The Bill proposed that a penalty would be imposed on any person who asserted that persons duly married under the Act of 1899 were not truly and sufficiently married, or who alleged the illegitimacy of the children of such marriages. Incredible to say, the Bill was actually defeated by one vote in the Upper House, which apparently deemed its duty to be to encourage onslaughts on the legislation of the State, the grounds alleged for attack being purely sectarian. The Ministry reintroduced the Bill in 1925 and secured its passage, but only after the change of the terms proposed to the colourless 'husband and wife'. Even so it was calculated that the defeat of the Government at the ensuing election was due to sectarian prejudice.<sup>1</sup>

In Quebec in 1923<sup>2</sup> an amazing state of affairs came to light. It appeared that the Protestants of Quebec had since 1903, by an Act of that year, been placed in the absurd position of having logically to admit Jews to a share in the control of Protestant schools, and to recognize the qualifications of Jewish teachers. Fortunately the constitutionality of the Act was denied by the Quebec Court at the close of 1924, negating the ludicrous claim that Jews were intended to be included in the term Protestant, which has always had a definite meaning in Canada. The fault of the Protestant community in acquiescing in the Act of 1903 is inexplicable, and it was very natural that the Jews should not merely object to any interference with the Act, but should claim that they should be given a greater share of control and be allowed to manage all schools in which more Jewish children were present than Protestant. The principle of separate schools clearly demands fair treatment of all denominations, but not the flinging of the burden of Jewish schools on to the Protestants.

<sup>1</sup> A similar difficulty was met by legislation in New Zealand without acute controversy (No. 65 of 1920).

<sup>2</sup> *Canadian Annual Review*, 1923, pp. 611 f.; 1924-5, pp. 321-3; 1925-6, pp. 373, 391, 392. On a reference on appeal the Supreme Court of Canada also denied the position of Jews as Protestants and affirmed the legality of distinct schools for Jews. See Act 1925, c. 45.





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**PART VIII**

**IMPERIAL UNITY AND IMPERIAL**  
**CO-OPERATION**



# I

## THE UNITY OF THE EMPIRE

### § 1. *The Existing Unity*

#### (a) *The Unity of the Empire*

THE record of responsible government, as has been seen, is largely the history of successive surrenders of authority by the Imperial Government until the stage is reached when Sir R. Borden and Mr. Hughes, no less than General Smuts, can talk without patent absurdity about the Dominions as autonomous nations, free and equal members of a British Commonwealth of Nations—an odious phrase to which no person has yet ascribed an intelligible meaning, but which appears to have the same satisfactory sound to certain types of mind as the blessed word Mesopotamia. This species of oratory does help to confuse issues and to postpone the necessity of settling difficult questions, but it is undesirable to ignore the fact that, as General Smuts in an unguarded moment admitted, the Dominions are still largely in the position of dependencies.

It is perfectly true that the Governors of the Dominions are selected only after consultation with the Dominion Governments, but there is no sign that, save in the very minor case of the Australian States, the most complete unanimity on the part of political parties would result in the Imperial Government consenting to any change in the existing system, by which the selection is normally that of the Imperial Government. Even the very minor concession of agreeing to choose an Australian for appointment to an Australian State has once more in 1926 been made conditional upon the agreement of all political parties, which practically means an indefinite postponement. Even the Irish Free State was not given the power to elect the head of the Executive, though Mr. T. Healy undoubtedly was an ideal choice and one acceptable to the State for its Governor-General. There is no sign that the Imperial Government would be prepared to concede the right to any Dominion to appoint by popular or Parliamentary election the head of the State, and such a position of affairs is manifestly incompatible with autonomy of any kind.

Equally incompatible with autonomy is the fact that no Dominion has any vital power of constitutional change. In the case of Canada the position, indeed, though explicable and natural, is almost ludicrous. It was impossible for the Dominion in the crisis of the war, though there was pressing need for avoiding a general election if that could be helped, to proceed by its own legislation, and an appeal to the United Kingdom had to be dropped in 1917, because, while the proposal could have been passed through both Houses, there would have been too much opposition for the Imperial Parliament to feel justified to act. Not a single clause of the *British North America Act* affecting the framework of the Dominion federation can be altered save by the position of first attaining practical unanimity in the Dominion, both as regards the federal Parliament and the provincial Legislatures, and approaching the Throne with humble addresses. It is easy to understand that Quebec, eager for her privileged position, is unwilling to see any wider power of alteration entrusted to the people of Canada, but the fact remains that a nation which is thus fettered and bound is not autonomous, and, if it acquiesces in the position, it is because it is conscious that it has not yet attained national status, but still is a quasi-dependency. No censure of such an attitude is just or desirable. Each country is the best judge for itself whether it has the strength to claim national status or whether, seeing that it has many years before it, it should not first consolidate its strength before it seeks to alter its status.

The Commonwealth is in no vitally better condition. It is true that on the surface the people of the Commonwealth have a wide power of constitutional change, but that is confined, it seems certain, within the framework of a federal Constitution, and any wider change would not be legitimate. The Irish Free State is bound to a treaty which cannot be altered save by the consent of the Imperial Government and Parliament, and from which neither has any intention of deviating. The unitary colonies of the Union of South Africa, New Zealand, and Newfoundland are in a freer condition as to alteration of the details of their Constitutions, but no less than the greater Dominions, or the responsible government colonies of Malta and Southern Rhodesia, they are essentially dependencies. Change details as

they will, they cannot enlarge their powers by any act of their own, they cannot alter their status or convert themselves into equal partners in a Commonwealth.

Their dependency is revealed not merely by this general subordination of their Constitutions to the Imperial Parliament, whence they derive their legal authority, but also in minor but very important ways. The power of disallowing Dominion laws is largely obsolete, but for very simple reasons. The Imperial Government has surrendered to full Dominion control great areas of activity, and does not desire to interfere with the exercise of discretion by the Dominions within these fields. But the Imperial Government has never relaxed control in any matter vital to the Empire. It does not disallow Acts, because Bills which are fatal to Imperial interests never become law. It has secured the restriction within narrow limits of the exercise of merchant shipping legislation even by the great Dominions, and, as late as 1925, after all her efforts to keep within her powers the Commonwealth Government found sections of the *Navigation Act* pronounced *ultra vires* as repugnant to the Imperial *Merchant Shipping Act*, 1894. Not until British authors found it worth while was the grip of the Imperial Government, which was justified by no consideration of fairness, relaxed on Canadian copyright law. Not a single Dominion has passed a Bill regarding international matters to which any Imperial Government could possibly take exception, save Newfoundland, and her legislation in 1907 was promptly overridden by an Imperial Order in Council under an Imperial Act. The immigration legislation of the Dominions has been carefully recast to meet Imperial objections, and the failure to intervene in the Dominions effectively to secure the rights of British Indians has been dictated, not by any belief that any Act passed by a Dominion must be allowed to stand, but by the consideration that the goodwill of the Dominions and their racial purity are factors of such importance that strong measures must be deprecated, while if these are not feared, there is higher hope for an accommodation. If the native policy of South Africa is unjust and impolitic, it would be absurd to pretend that the Imperial Government has any direct interest in it, or would be justified in intervention. It may frankly be confessed that under Imperial control before responsible government native

policy, though well meant, was not brilliantly conducted. Canada has not dared to attempt to carry out her wish to extinguish the hereditary effect in Canada of honours to dealers in hog products and party journalists which she disapproves, and such subservience cannot be regarded as compatible with autonomy. General Hertzog has refrained from any suggestion of such a result, and the Irish Free State is in like condition. Moreover, all the Dominions have placed on record that, if they pass any legislation affecting the security of stocks which have been admitted to trustee rank under the *Colonial Stocks Act*, 1900, these Acts will properly be disallowed. And the protagonist of autonomy, General Smuts, has frankly admitted that the Union cannot pass an Act severing connexion with the Empire, and that neither the Governor-General nor the Crown would be entitled to assent to such an Act.

Still more obvious is the paramount power of Imperial legislation, solemnly reasserted in the Irish Constitution Act of 1922, as an effective rebuke to the vain boast of the Constitution that all powers in Ireland are derived from the people, whereas not a single power could be derived from any other source than the legal authority given by the Parliament of the United Kingdom. It is idle to ignore the fact that any Imperial Act which by its express terms of necessary intendment applies to the Dominions binds all their people, their Governments, and their Courts, and the *British Nationality and Status of Aliens Act*, 1922, is a recent example of the frank use of such superiority over all Dominion legislation, just as is the Act of 1923 regarding the Turkish treaty of peace. Moreover, another side of this activity is the unquestioned supremacy and binding force of all the old Imperial Acts which refer to the Empire as a whole. Their existence precludes the necessity of frequent exhibitions of the supreme power of legislation, but it was only on 12 October, 1925, that an Order in Council under the *Fugitive Offenders Act*, 1881, applied part ii of that Act to the whole of the British possessions, protectorates, and mandated territories in the Pacific. The convention that Imperial legislation affecting the Dominions ought to be passed after consultation with the Dominions is important and normally acted on, but no Dominion wishes will preclude the Imperial Government from passing an Act like the *Indemnity Act*, 1920, where it is deter-

mined to secure adequate indemnity for its officers and subjects and doubts the adequacy of Dominion powers.

Yet another sign of dependency is the inability of the Dominions to legislate with extraterritorial effect save under express Imperial legislation. It is comic but true that a protected Malay State can legislate for all its subjects anywhere, and can in its own area give effect to its legislation, but the Dominion of Canada has no such power. What is more amazing is that, when this power was asked for formally by the Dominion in 1920 and a formal request sent from both Houses of its Parliament, in lieu of ready acceptance it was necessary once more to appeal in 1924, and even then the petition went ungranted during the whole of 1925-6. It may be argued that there were difficulties of adjustment, and that is perfectly true, but autonomy is an absurd expression to apply to a Dominion thus narrowly hampered and restricted, which cannot, admittedly, effectively control her air service.

A further and decisive mark of dependency is the appeal to the Privy Council. Nothing is more absurd than to pretend that this appeal is maintained voluntarily by the desire of the Dominions. It would be a very simple thing to test the genuineness of the assertion by merely enacting that after the period of, say, one year appeals from any Dominion shall lie only as provided by Dominion legislation. The amount of such legislation would be minimal. The appeal is kept alive partly by reason of the advantages it presents to members of the Dominion legal profession, now that it is no longer usual for any appeal to be dealt with by English counsel alone, partly and mainly because it would be extremely difficult to induce the Imperial Government to abolish it. All the expressions of goodwill and desire to meet Dominion wishes at successive Imperial Conferences do not include a single offer to abolish the appeal. The Irish Free State had the appeal thrust upon her when she desired to be free from it in 1922; the Union of South Africa all but shook it off, and rejoices in the fact that the Privy Council is conscious that it is not able to deal profitably with Roman Dutch Law, which it does not understand. In the Commonwealth the appeal would have been much further reduced in 1900 if Mr. Chamberlain had not gone behind the backs of the delegates and appealed to the Chief Justices of the



Colonies, who were naturally more conservative than the delegates. Canada in 1875 would have given no appeal if it could, and in 1888 it did, though vainly, enact that no appeal should lie in criminal cases. Quebec dominates Canadian action and insists on the appeal, but it is a badge of inferiority, and the mere fact that the Imperial Parliament will not even allow a single Court of Appeal containing Dominion judges to hear all appeals within the Empire is sufficient proof of its conviction, due to the legal professions of England, of the hopeless inferiority of Dominion judges.

It is instructive to note that, despite the apparatus of Imperial War Cabinets and Conferences, and admission of the Dominions into the League of Nations, there remains no real equality of the Dominions in matters of foreign policy. The issues of war and peace rest decisively with the Imperial Government; no Dominion can declare war, none can make peace; no Dominion can even make a commercial treaty except with the sanction of the Imperial Government, and subject to ratification with the same sanction. The alleged concession of the treaty right to the Dominions in 1923, and even 1926, is a mere chimera. No Dominion can accredit a minister; it must be done for that Dominion by the Imperial Government. The Imperial Government remains ultimately responsible for every wrong done to foreigners by British subjects, which under international law gives rise to an international claim. It is perfectly open for foreign Governments to address through their officials in a Dominion requests for redress for wrongs, but, if this is not accorded, or if the Dominion on being approached will not consent to refer the matter to the Permanent Court of International Justice, then the foreign power is entitled to seek redress from the Imperial Government, and indeed must do so, if it is proposed to carry the question to the extent of a breach of friendly relations. No one is so foolish as to imagine that any grave issues between the United States and Canada—improbable as it may seem—could be disposed of by the United States without bringing in the Imperial Government, which would have to make up its mind whether it supported or declined to support the action of Canada which was impugned. The mere fact that the Locarno Pact was concluded long before a single

Dominion had made up its mind on its merits—New Zealand did not pretend to do more than trust the British Government, with a faith which one could have wished better deserved—is sufficient proof that in all essential foreign affairs the Dominions are mere dependencies. As Lord Parmoor justly remarked in the Lords on 1 March, 1926, such a pact deeply affects the Dominions, and no saving of them from active obligation under it, unless accepted by their Governments, makes any difference. Moreover, such actions as the British suppression of responsible government in Egypt for a prolonged period, to the benefit of the personal rule of the King and the overthrow of the Constitution, may vitally affect the Dominions by the unfavourable reactions they present, but Dominion intervention is wholly impossible.

As a corollary no Dominion relies on herself for defence; Canada makes no effort whatever, and Australia and New Zealand merely seek to co-operate with the Imperial navy in case of danger, while South Africa expects the United Kingdom to maintain the sea routes, and the sea defence of India is still Imperial in essence.

The unity of the Empire, therefore, expresses itself in one form in the fact that the Dominions—and in far higher degree India—are dependencies, a fact which interminable rhetoric will not remove. The advantages of the condition of dependency are doubtless very great. The protection of the United Kingdom permits the development of natural resources, in accordance with the doctrine of Sir W. Laurier that the efforts of Canada were infinitely better spent on railways and immigration than in fortifications, which would, thanks to the Monroe doctrine, never be wanted. Moreover, Imperial protection has secured a power of development free from all foreign intervention, the importance of which can hardly be overestimated. Nothing but this consideration would have preserved Australia and New Zealand from becoming the legitimate object of aspiration for Japan, whose overcrowded population may, so far as ethical considerations are concerned, feel grave doubt as to the justice by which they are compelled to remain in unfavourable circumstances while a scanty race, which is neither prolific<sup>1</sup> nor has any desire to be, occupies enormous areas which it

<sup>1</sup> *Official Year Book of the Commonwealth*, 1925, pp. 958 ff.

cannot fill. Even the Union of South Africa owes its power to exist to British protection ; else the rapid German penetration of South-West Africa must have ended in German occupation of the territory, which by itself could have done nothing effective in self-defence. It is curious how completely these facts are forgotten even by men so well-meaning as Messrs. Bruce and Massey in their demands for a British preference.

*(b) The Unity of the Crown*

The Crown unquestionably serves in the most effective way as the symbol and expression of Imperial unity. The fact that—outside the Irish Free State—the government is regularly carried on in the name of the Crown is much more than a mere form ; it familiarizes the people of the Empire with the sense of their membership of a single organization. Moreover, the Crown serves to satisfy one of the most essential needs of the human mind at the normal level of intelligence, the desire for something concrete as a centre of attention. The idea of a common allegiance and a common loyalty is furthered by the monarchical system of government in the Empire in a manner which probably cannot be exaggerated. If it were removed, it is extremely difficult to see how it could effectively be replaced. There is no difficulty in acting in the name of the State in lieu of the Crown, but two people far severed in space will not be encouraged to cherish any sense of unity by such a device. The most convinced admirer of republican institutions and opponent of the more unattractive side of courts must confess that it would be extremely difficult to devise a satisfactory substitute, for Imperial as opposed to local purposes, for the House of Windsor. Nor can any fair judgement deny that the abstract unity of the Crown has been made infinitely more real by the Prince of Wales's peregrinations of the Empire. The same feeling which prefers a King to a State as an object of loyalty is greatly, indeed rather amazingly, reinforced by the presence even temporarily of a future sovereign.<sup>1</sup> There can be no doubt that a very considerable impression was made even on the Boers of the Union by the actual presence among them of the Prince of Wales. In no respect, moreover, does the

<sup>1</sup> The Duke of York's visit to Australia and New Zealand in 1927 was welcomed with great warmth in both Dominions.

purely constitutional aspect of the Crown appear to greater advantage ; those who regret the decline of personal initiative and control should set against whatever there may be therein of loss the far greater advantage derived from the impossibility of associating the Crown<sup>1</sup> with any party tactics, often disreputable enough.

Moreover, the unity of the Crown results in a common status as British subjects which has, as we have seen, not yet been made the subject of any serious inroad. It bears with it one great advantage, the obtaining by a British subject of all concessions made to British subjects personally, even if he is born or domiciled or usually resident in a Dominion in which subjects of the foreign country are denied every right. It may be that foreign nations are over-generous in conceding such a state of affairs, but the influence of the Imperial Government has been steadily devoted to maintaining it intact, and so widely has it been acted on that any proposal by a foreign power to limit it might justly be regarded as a somewhat unfriendly attitude.

There is no essential deviation from this unity in the fact that the Crown appears in various aspects, and that in these aspects there may be collisions of interest and of rights. A State in Australia may sue another State, or a State the Commonwealth, and doubtless to this extent there is distinction of aspects within the Crown, just as there is in Canada between the Federation and the Provinces and each Province.<sup>2</sup> The King in each part of his dominions has a distinct personality for certain purposes, but the unity of the personality can be given effect to whenever the aspect of personality be unimportant. Thus a Select Committee of the House of Commons in 1879 pronounced vacant the seat of Sir B. O'Loughlen,<sup>3</sup> member for Clare, because he was then Attorney-General for Victoria, and it was ruled, quite soundly, that though the post was conferred

<sup>1</sup> Contrast Lord Byng's identification of himself with Mr. Meighen in July 1926.

<sup>2</sup> *The State of New South Wales v. The Commonwealth of Australia*, 7 C. L. R. 179 ; *South Australia v. Victoria*, 12 C. L. R. 667 ; *The Dominion of Canada v. The Province of Ontario*, [1910] A. C. 637. Cf. Baty, *Harvard Law Review*, xxxiv. 843 ff. ; *The Commonwealth v. New South Wales* (1923), 32 C. L. R. 200, 218 ; Harrison Moore, *J. C. L.* vii. 155 ff.

<sup>3</sup> Cf. *Law Times*, 11 Feb. 1905, p. 34 ; *Hansard* (ser. 3), ccxlv. 1104.

by the Governor and was in Victoria, none the less he had accepted an office of profit under the Crown, and could not continue to sit in the House of Commons. Again, in *Williams v. Howarth*,<sup>1</sup> a soldier of New South Wales who served in the South Africa War desired to claim from the local Government the full 10s. a day at which he had agreed to serve; the State Government pointed out that he had received 4s. 10d. from the Imperial Government and that this amount should be set off. The Supreme Court of New South Wales held that a contract was a contract, and that the Crown in New South Wales and in the Imperial Government were two different things, but the Privy Council negatived this reasoning, ruling that there was in the case nothing to make it necessary to insist on the diverse aspects of the Crown. The doctrine has been repeated in a new form by the High Court of Australia. It was *prima facie* reasonable to hold that the Crown in the Commonwealth and in the States were two different things, so that a Commonwealth Act could not be deemed to bind the Crown in its State aspect and vice versa. But the High Court frankly held that the Crown is essentially one and indivisible, and that a Commonwealth Act could bind the Crown in its State aspect as much as it bound the Crown in its Commonwealth aspect, and could bind the Crown in the former aspect without affecting it in its latter side.<sup>2</sup> This accords perfectly well with the fact that a petition of right only lies against the Crown in the Government by which the debt if any is due.<sup>3</sup> In this case, obviously the whole essence of the matter is that in one specific aspect there is a right against the Crown, which does not exist in any other.

## § 2. *The Future of the Empire*

### (a) *Early Views of Imperial Relations*

The loss of the American colonies was responsible for the widespread pessimism as to the value of colonial possessions which prevailed in the first half of the nineteenth century; if

<sup>1</sup> [1905] A. C. 551, overruling 2 S. R. (N.S.W.) 452.

<sup>2</sup> *Amalgamated Society of Engineers v. Adelaide Steamship Co.*, 28 C. L. R. 129; *Pirrie v. McFarlane*, 36 C. L. R. 170 (State law).

<sup>3</sup> This is now established by *A.-G. v. Great Southern and Western Railway of Ireland*, [1925] A. C. 754; *Price v. R.* (1926), 42 T. L. R. 179.

colonies were certain to secede when they had developed strength to stand by themselves, and in the meantime were a source of expense and entailed risk of war, why should they be kept ? Adam Smith <sup>1</sup> held that they served no advantageous commercial purpose, and Radicals like Joseph Hume <sup>2</sup> and Lord Brougham <sup>3</sup> were prepared to welcome the separation of Canada from the United Kingdom. A definite opposition to this pessimism was indeed offered by Lord Durham, Charles Buller, <sup>4</sup> E. G. Wakefield, <sup>5</sup> and Sir J. Molesworth, <sup>6</sup> but the two former died in 1840 and 1848, Molesworth in 1855, and Wakefield discredited himself, even before he fell into ill-health. Moreover, the doctrine of responsible government which they preached was accompanied in their minds with the limitations of preserving for the Imperial Government control of immigration and settlement, and the maintenance of free trade. When, therefore, it was held necessary to surrender the Crown lands and to allow the Colonies tariff autonomy, the ideas of the reformers seemed discredited. Carlyle <sup>7</sup> indeed came out as an advocate of emigration at governmental expense, but, though he valued the Colonies on this score, he was opposed to their tariff autonomy, and had no liking for parliamentary government in them any more than in the United Kingdom.

The rise of the Manchester school was definitely hostile to colonial connexions. Cobden <sup>8</sup> classes the colonies with the army, navy, church, and the corn laws as accessories to aristocratic government, which should be purged from John Bull's system. In 1865 he welcomed Canadian federation only as a step to separation ; deriding the loyalty of people who neither paid British taxes, nor obeyed British laws, nor were willing to fight for the Empire, who repudiated British sovereignty over her soil, and taxed to exclusion British manufactures. Bright, <sup>9</sup> in the same year, held that Canada would be as friendly if she were independent, and in 1867 admitted that in his view Canadian loyalty was rather expensive when it consisted in

<sup>1</sup> *Wealth of Nations*, Bk. IV, chap. vii, pt. iii.

<sup>2</sup> *Hansard*, ser. 3, viii. 250.

<sup>3</sup> *Ibid.*, ser. 3, xl. 213 f. ; lv. 266.

<sup>4</sup> See Wrong, *Charles Buller* (1926).

<sup>5</sup> *Art of Colonization* (1849).

<sup>6</sup> *Selected Speeches* (ed. Edgerton, 1903).

<sup>7</sup> *Latter Day Pamphlets*, pp. 94 ff.

<sup>8</sup> *Political Writings*, p. 2 ; Morley, *Life of Cobden*, i. 230.

<sup>9</sup> *Speeches*, i. 153 f., 167.

asking for guarantees for railways, grants for fortresses, and for works of defence. Sir G. Cornwall Lewis,<sup>1</sup> after carefully proving that Britain derived neither tribute, military assistance, trade facilities, faculties for the transportation of criminals, nor trade outlets in substantial measure from her colonies, was prepared to let them go despite the prestige they brought. Disraeli wrote to Lord Malmesbury on 13 August 1852<sup>2</sup> that 'these wretched colonies will all be independent in a few years and are a millstone round our necks'. J. A. Roebuck,<sup>3</sup> who defended a colonial empire in general, despaired of Canada. A. Mills,<sup>4</sup> who wrote interestingly on Colonial Constitutions, recorded ultimate independence as accepted as the end to be achieved. Lord Grey<sup>5</sup> admitted to Lord Elgin that separation was accepted as desirable by some members of the Cabinet; R. Lowe<sup>6</sup> urged Lord Dufferin on appointment in 1872 to make it his business to get rid of the Dominion. Lord Clarendon on 1 June 1870<sup>7</sup> wrote to Lord Lyons that he wished the North American Colonies would disannex themselves, and a year earlier Lord Granville<sup>8</sup> had expressed the same views, owing in either case to the grave difficulties then experienced with the United States. It is clear that not only Sir James Stephen,<sup>9</sup> Permanent Under-Secretary for the Colonies from 1836 to 1847, but also Sir F. Rogers,<sup>10</sup> who filled the same office from 1860 to 1871, and Sir Henry Taylor were advocates of ultimate separation. Rogers's view was simply that 'a spirited nation will not submit to be governed in its internal affairs by a distant Government, and the nations geographically remote have no such common interests as will bind them permanently together in foreign policy with all its details and mutations'. A similar note was struck by Anthony Trollope,<sup>11</sup> who held that separation was ideal, because of the gain to the Colonies, whose advance was retarded by connexion with the Mother Country, while a state of dependence was humiliating and would not be tolerated by

<sup>1</sup> *Essay on the Government of Dependencies* (1841).

<sup>2</sup> *Life*, iii. 385.

<sup>3</sup> *The Colonies of England* (1849).

<sup>4</sup> *Colonial Constitutions* (1856).

<sup>5</sup> See Morison, *British Supremacy*, p. 266.

<sup>6</sup> Lyall, *Life of Lord Dufferin*, i. 286.

<sup>7</sup> Newton, *Life of Lord Lyons*, i. 292.

<sup>8</sup> Fitzmaurice, *Life*, ii. 22.

<sup>9</sup> Ed. C. E. Stephen (1906).

<sup>10</sup> *Letters of Lord Blachford* (1896).

<sup>11</sup> *The West Indies*, p. 84; *North America*, i. 129; *Australia*, i. 22, 363 ff.; ii. 497.

a Colony when fully developed. Goldwin Smith<sup>1</sup> marks the clearest development of this view ; he held that Canada was stifled in her growth by her dependency, which resulted in the unnatural effort to sever her from her immediate connexions with the United States, and forced her into a development from east to west instead of across the border south. Colonies were a source of expense for defence purposes ; of weakness, since they were difficult as well as costly to defend and involved constant risks of trouble with foreign powers ; and of danger through dissipation of resources on their protection. Charles W. Dilke's *Greater Britain* (1868) is marked by the same spirit as regards Canada, which in his opinion neither could nor should be defended against the United States. Moreover, like Goldwin Smith, he was distinctly inclined to deprecate the artificial arrangement by which the French of Quebec were protected from contact with the democratizing and liberalizing influences of the United States.

(b) *The Imperial Federation Movement*

The natural outcome of the movement towards separation was the very cold attitude of Lord Granville in 1869 towards New Zealand, most strikingly shown in the terms of his reply of 21 March 1869 to the request for a loan of £1,500,000 for defence purposes as a result of the muddle of the Maori War. Lord Granville insisted that the settlement of New Zealand had not been instigated by the Imperial Government ; that the wars had been caused by the greed of the settlers and their desire to drive the natives into rebellion and seize their lands ; and that, so far from having any claim on the Imperial Government, the colonists owed to it a grave debt. Next year this episode had a reverberation in the proposal of the Victorian Royal Commission on federation that the colonies should ask for neutrality and the power to make their own treaties. But the separatist movement was just then to receive a decided check. The fact that separation seemed somewhat nearer readily revealed the fact that there was no popular demand for it. The Government, after sounding a rather dubious note in Lord Granville's reply to a deputation of representatives of colonial and other interests of 15 December,<sup>2</sup> gave in January

<sup>1</sup> *The Empire* (1863) ; *Canada* (1891).

<sup>2</sup> *The Times*, 17 Dec. 1869.



1870<sup>1</sup> a categorical assurance to commissioners from New Zealand that they had no idea of separation. It is true that neither Lord Granville<sup>2</sup> in reply to Lord Carnarvon in the Lords on 14 February, nor Mr. Gladstone<sup>3</sup> in response to Mr. R. R. Torrens, ex-Premier of South Australia, in the Commons on 26 April 1870, was absolutely satisfactory, but on 12 May 1871<sup>4</sup> the Under-Secretary for the Colonies was authorized to express a very emphatic opposition to any idea of separation, and Mr. Gladstone,<sup>5</sup> though he may have believed that separation was ultimately inevitable, strenuously denied that he had ever looked forward to it with anything but regret or had ever contemplated it as anything but undesirable. Disraeli,<sup>6</sup> who seems to have been more bitterly opposed to the possession of colonies than almost any one save Robert Lowe, came out in 1872 with the preservation of the Empire as a part of the Conservative creed, but he had quaint views on the preservation. He censured severely the failure to enforce on the Colonies free trade, and would have claimed the retention of the Crown lands for British benefit, the fixing of their duties as to defence, and the creation of a representative council in London. The Royal Colonial Institute, whose beginnings date from 1868, became a supporter of the United Empire which was its motto, and by 1871 the movement towards a higher appreciation of and closer relations with the Colonies had so grown in respectability that an important meeting at the Westminster Palace Hotel in July showed a wide circle of distinguished names. There were various schemes on foot for furthering such closer relations. One, which had the support of Sir Bartle Frere, was the admission of colonial representatives to the Imperial Parliament,<sup>7</sup> either with votes or, to avoid the difficulty of party affiliations, without them, while the more simple scheme of admission to the Lords was favoured by Colonial writers among others. A true federation was recommended by Lord John Russell,<sup>8</sup> E. Jenkins, P. F. Labilliere, and F. Young, but

<sup>1</sup> Rusden, *New Zealand*, ii. 600 f.

<sup>2</sup> *Hansard*, ser. 3, cxcix. 213.

<sup>3</sup> *Ibid.*, cc. 1901.

<sup>4</sup> *Ibid.*, ccvi. 761-8.

<sup>5</sup> Cf. 4 Apr. 1849; *Hansard*, ser. 3, civ. 354; 28 March 1867; clxxxvi. 755; Parkes, *Fifty Years*, ii. 103.

<sup>6</sup> *Life*, v. 194 f.

<sup>7</sup> Lord Rosebery (29 July 1884) suggested their presence in the Lords.

<sup>8</sup> *Speeches and Dispatches*, p. 152; Labilliere, *Federal Britain*; Young, *Imperial Federation*.

all the lucubrations on the subject display a complete lack of appreciation of the fact that the Colonies did not wish anything of the sort. A Council of Advice was a favourite idea, very vaguely conceived, and others simply proposed the development of colonial autonomy. Thus Mr. Torrens<sup>1</sup> suggested the reduction to a minimum of the veto on colonial legislation, and the representation of the Dominions in London on the same basis as foreign countries. Lord Bury<sup>2</sup> revived Lord Melbourne's admirable advice: 'Why can't you let it alone?' He pointed out that any reduction of colonial autonomy would be deeply resented, and Mr. C. Adderley<sup>3</sup> held much the same view. But Professor J. R. Seeley's *Expansion of England* gave the most classical form to the movement; he insisted on the doctrine that the settled colonies were essentially an extension of England, and that their connexion with the United Kingdom was vital and natural. Further, in view of the growth of the United States and Russia, France and Germany must sink into the rank of second-class powers, and the same fate would be Great Britain's if she did not succeed in having some better bond of union among her peoples than mere common subjection to the Crown. He pointed out that representative government had enabled the national state to excel ultimately the city state, and he suggested that federation would solve the problem of the Empire, though he never pressed for any immediate scheme. Mr. J. A. Froude's influence<sup>4</sup> was much more vague and less consistent, for, while he began his interest in colonial affairs in 1870-1 from the standpoint of an advocate of closer unity, his South African adventures from 1874-6 left him an advocate of the surrender of everything in South Africa save the Cape Peninsula, and his later wanderings in Australasia and the West Indies left nothing more than a general impression of the desirability of holding to the Empire, which finds expression also in Tennyson's patriotic poetry. Froude, indeed, was sensible enough to realize that the colonial spirit of nationalism was definitely inclined to oppose federal schemes.

Others, however, were more hopeful, and the Imperial

<sup>1</sup> *Hansard*, ser. 3, cc. 1817 ff.

<sup>2</sup> *Ibid.*, 1852.

<sup>3</sup> *Colonial Policy* (1869); *Nineteenth Century*, Sept. 1884.

<sup>4</sup> Especially *Oceana* (1886); *The English in the West Indies* (1888).

Federation League came into being in 1884. It is, however, significant that at the very first meeting on 29 July 1884 to further its inception, the warning that it was doomed to failure was given. Mr. W. H. Smith, First Lord of the Admiralty in the administration of Lord Beaconsfield from 1877 to 1880, propounded the theory that the existing relations of the Empire must inevitably lead to federation or disintegration, but Sir C. Tupper, High Commissioner for Canada, could not concede the legitimacy of the alternatives, urging that existing conditions might well develop satisfactorily in some other sense. None the less the Federation League was ultimately formed, and secured a good deal of patronage. On Mr. W. E. Forster's death in 1886, Lord Rosebery became President, and, when he resigned in 1892 on entering Mr. Gladstone's Ministry, Lord Stanhope took his place. Branches were formed overseas; that in Canada<sup>1</sup> opposed naturally the annexationist propaganda in favour of the United States, and developed as a counter-movement the doctrine of Imperial preference, which naturally somewhat embarrassed the free-trade Federation in London. It had a considerable share in arranging the Colonial and Indian Exhibition of 1886, and immediately after it pressed on the Government the desirability of calling a conference of Empire delegates to consider the question of more effective defence of the ports and commerce of the Empire and the promotion of intercourse, commercial, postal, and telegraphic, between the various parts of the Empire in time of peace, and other means of closer relations. The Conference actually summoned was not asked to consider closer political relations, because it was known that in Australia at least such a discussion would be regarded with suspicion and dislike. The League, however, was satisfied with so much progress and aimed at securing the holding of further conferences and the effort to prevent in them the elimination of the political issue. But under Lord Rosebery's advice it made no effort to frame a federal scheme, until, on its urging Lord Salisbury on 17 June 1891 to call a conference to consider the sharing by the different parts of the Empire of privileges and responsibilities, that statesman demanded a definite scheme to place before any Conference. All, however, that could be excogitated was a

<sup>1</sup> Contrast Macdonald, *Corr.*, pp. 453, 458, 468.

plan,<sup>1</sup> only to be effective when Australia and South Africa were federated, of a Council in which these great Dominions, together with Canada, should have had a representative apiece, and which would apparently have had advisory powers and have discussed defence questions without any power to raise taxation. Mr. Gladstone, to whom this scheme was presented on 13 April 1893, rightly declined to treat it as in any way meeting the requirements of the case, and he seized upon a suggestion of preferential trade which Sir C. Tupper had foisted in,<sup>2</sup> as involving a principle to which the Imperial Government could not possibly agree as a means of furthering Imperial unity. Moreover, the plan neither defined the powers of the Council nor the principle on which the burden of defence was to be distributed.<sup>3</sup> As a result, the Federation movement was formally dissolved.<sup>4</sup> Sir C. Tupper had in effect shown that there were two quite disparate motives at work. On the one hand, some of the members felt that the Colonies should aid in their own defence and subsidize the navy, while Canadian federalists had no interest in the scheme unless as a means of securing Imperial preference, without any surrender whatever of Colonial autonomy.

The fall of the federation was followed by a definite movement toward Imperial preference, which, expressed firmly in 1894 at Ottawa, was steadily repeated at conference after conference until in war conditions it was accepted by the Imperial Government in 1917 and made effective in 1919. It was, it may be said at once, never desired by the supporters of preference in Canada that the principle should lead to closer political relations, nor is there any symptom that it can ever have this effect. The essence of Imperial preference as practised in the Dominions is the maintenance of absolute control over the tariff in the hands of the Government, which can manipulate it freely to secure that every nascent industry shall be protected against all competition, while there must be the power of differentiating in favour of foreign countries, although no foreign country will normally be given as good terms as the United Kingdom. Complete tariff control, however, is necessarily incompatible with any federal relations, not as a matter of theory, but as a matter of practice, and there is now little tendency to adduce

<sup>1</sup> *Imperial Federation*, 1 Dec. 1892.

<sup>2</sup> Saunders, *Life*, ii. 170 ff.

<sup>3</sup> *Imperial Federation*, 1 May 1893.

<sup>4</sup> *Ibid.*, 1 Dec. 1893.

preferential trade relations as any help towards a political consolidation ; rather this is definitely held up as an alternative to such consolidation.

From the political point of view the Conferences, as will be seen, have shown a steady tendency towards the recognition of co-operation alone as the means of progress. The ideal of federation indeed did revive as the result of the War, for such events unsettle men's minds and drive them to clutch at straws. A perfectly honest attempt was made in 1916,<sup>1</sup> after a prolonged period of agitation, to induce the people of the United Kingdom and the Dominions to believe that an answer must be found to the question how a British citizen in the Dominions can acquire the same control of foreign policy as one domiciled in the British Isles. It is scarcely credible that groups of earnest students all over the Empire could have failed to see that the question was a mere absurdity. It was apparently supported by a quite ridiculous statement of Mr. Fisher, who had been Prime Minister of the Commonwealth, that, when he occupied that position, he had no say whatever in Imperial policy, while as an elector in Scotland he could heckle his member on questions of Imperial policy, and vote for or against him on that ground. There is no possibility of dealing successfully with political matters if one does not possess a sense of humour, and Mr. Fisher must often have regretted that he ever committed himself to this farrago of nonsense. Even the least intelligent of mankind must have realized that, if the Prime Minister of the Commonwealth had no voice in Imperial policy, it was not because he had not a vote in a Scottish village, but because the Commonwealth did not desire to take any interest in Imperial policy. The moment that Mr. Fisher awakened to the desire

<sup>1</sup> The admirable but not keen-minded Gen. Botha was rendered anxious by it (letter of 20 Oct. 1916), but Sir W. Laurier soothed his fear (Skelton, ii. 463 ff.). I dealt seriously with the absurdities of the *Round Table* group in the *Canadian Law Times*, xxxvi. 831 ff., not because it seemed worth while, but at the request of the late Mr. Lefroy, whose amiable character rendered it a pleasure even to waste time in exposing fallacies. The group seems of late years to have abandoned the pursuit of chimeras, to have acquiesced in the practical independence of the Irish Free State, and to be concentrating on the wise endeavour to interest the Dominions in foreign policy, especially in the case of New Zealand. This is all to the good, and much may be pardoned to youthful exuberance.

to have a voice, he had no difficulty in obtaining the great concessions of the Imperial Conference of 1911, the fullest and freshest exposition of *arcana imperii*, but in 1912 he was urged—in vain—to have some representative in the metropolis to keep him fully and intimately *au fait* with all the proceedings of the Imperial Government in the foreign and other spheres. If this simple fact had been borne in mind, the circulation at a compassionate price of vast masses of arguments proving that Mr. Fisher must secure control of foreign policy by the federation of the Empire would have been avoided. It was recorded that the work had been carefully considered by groups throughout the Empire; yet not one of those groups seems to have been acquainted with the elementary facts obvious to every student, who had never visited any part of the Empire, that no Dominion would surrender one fraction of its acquired powers on any account. Yet the history of the Dominions was absolute proof of the fact. Not a single resolution in a single Dominion at any time in favour of Imperial federation could be pointed to; not a single Premier in office in the Empire could be cited in favour of federation; and yet it was solemnly contended that a case had been made out for an Imperial convention to discuss the subject. It is impossible to avoid the application to these enthusiasts of the terms applied by *The Times* to the Cannon Street colonists and their noble patrons of 1869–70, as ‘a class of men whose beliefs are dreams, whose thoughts are guesses, and who swallow the conclusions they accept’. Needless to say the first meeting of the Imperial War Conference of 1917<sup>1</sup> shattered the fabric of their dreams for ever. The assembled statesmen postponed indeed the consideration of change in the constitutional relation of the Empire until a constitutional conference, to be summoned at the close of the war, but they went out of their way to negative any federal solution by insisting that the existing rights of self-government on the part of the Dominions must be conserved. Unless and until any Dominion Minister lifts up his voice to advocate federation, it

<sup>1</sup> *Parl. Pap.*, Cd. 8566, pp. 41–61. Cf. on the whole subject, Egerton, *Brit. Col. Policy in the XXth Century*, pp. 148 ff. To his exposure of the uselessness of Pollard's scheme (*Evol. of Parl.*, pp. 372 ff.) of a single Imperial Parliament and local bodies (pp. 150 f.) nothing need be added. The numerous schemes of publicists, despite their ingenuity, may here be passed over.

may be hoped that the idle follies of 1916 may not be allowed to be revived.<sup>1</sup> The silence of the protagonists of that movement of later years suggests that the folly of youth has been succeeded by the sobriety of age and experience.

(c) *The Proposals for the Independence of the Dominions and India*

If the movement for Imperial federation may be held to have gone to its deserved oblivion, there is decidedly more life in the movement in the Dominions for independence. It is important to note the contrast between that movement and the effort to secure Imperial federation. The latter represented essentially a British view; it had support in the Dominions in small coteries of students out of touch with Dominion ideals and public life, living in an unreal world of their own making. The movement for independence has practically no real support in the United Kingdom, even the Independent Labour party is not anxious for it, and in fact there is no evidence that even in the older times, when separation was looked forward to by many sections of the people as inevitable, the idea ever possessed much popularity with the workers. In the different Dominions the movement rests on varied causes, and its essence is that it has real popular support, though in different degrees in various Dominions.

In New Zealand and Newfoundland, indeed, the movement has no real support. In the former a small section of the Labour party, infected by Australia and more remotely by the American influences which are often associated with the Industrial Workers of the World movement, may be indifferent to the Imperial connexion, but the obvious fact which confronts the people is that a small population cannot possibly hold New Zealand, unless it has the support of a great sea power. The British connexion is, therefore, essential to the Dominion, and hence follows the fact that New Zealand has been far from enthusiastic at the entrance of the Dominions into the League of Nations. Mr. Massey's reply<sup>2</sup> to the proposal that New Zealand should accept the Geneva protocol of 1924 was couched,

<sup>1</sup> Mr. Bruce (3 Aug. 1926) emphatically repudiated any idea of federation. No Dominion Minister seems ever to have adopted this view for many years past.

<sup>2</sup> *Parl. Pap.*, Cmd. 2458, pp. 13 ff.

if not in a narrowly nationalistic tone, still in one far from international. Mr. Coates also has been clear in his identification of New Zealand with British foreign policy, and he speaks, it is certain, not merely for his unduly swollen Parliamentary majority, but for the great majority of the electors of the Dominion. Newfoundland again is firmly British ; it is free from the temptation to gravitate towards the United States, which affects the Dominion, and, small as it is, it must have the protection of a great power to be of any account in the world.

In the case of the Irish Free State economic conditions, on the one hand, national feeling on the other, affect vitally the position. That the great majority of the Irish people would have been glad to receive international status and independence in 1921-2 is really free from doubt ; the only question can be what the majority was and how far it was deeply concerned at the issue. The commercial question, however, compels friendliness to the United Kingdom, for that is the one really splendid market open to the agriculturists and pastoralists of the country, and even Mr. de Valera recognized quite clearly that with independence the Free State must be ready to afford the United Kingdom all the necessary securities for freedom from danger from Ireland in the case of war of any kind. The Ministers who accepted the Constitution and the oath of allegiance have never concealed their belief that nothing in this acceptance forbids them working for the acquisition of formal independence, and the way has been paved for this end by the systematic omission of the name of the King in legal proceedings, in the army, in the legislature, and in the schools. But the fact remains that the economic position of the Free State renders her desire for independence always a little unreal ; it is a sign of a certain unpractical strain in the Irish mind that Mr. de Valera should not have had the sense to see that the difference between his own concessions in 1921 and what was actually arranged was more one of form than of reality. The Irish people, who at heart have a very keen grasp of reality and of material interests, are little likely in the long run to jeopardize their profit for mere sentiment.

The position in the Union of South Africa is more difficult. The population is certainly more than half Dutch as regards its European element, and the addition more or less effectively of



the Germans of South-West Africa supplies an element which is not inclined to the British connexion as ideal. The attitude of the Nationalists during the war became more and more openly one of assertion of the right of secession, and in the deplorable rioting of 1922 the rioters on the Rand were sustained and encouraged by the belief that the Boers would be induced to aid their revolt and to overthrow the Government. The formula which induced the Labour and the Nationalist parties to work together was merely agreement that in the Parliament of 1924 secession would not be made an issue.<sup>1</sup> Further, in 1925-6, the determined effort to bring about reunion of the Dutch was based, on the Nationalist side, without hesitation on the doctrine that the right to secede must remain an essential feature of the policy of the Nationalist party, so that if General Smuts's followers united with them they must definitely cast off their alliance with the former Unionist party which merged itself in the South African party, and abandon their profession of regard for the British connexion. General Hertzog,<sup>2</sup> it is true, has emphatically declared his opinion that secession is not to be thought of unless it came by the will of both elements of the population—unless indeed one element tried to dominate the other—and in the Union the British element cannot dominate the Dutch, but Mr. Tielman Roos has countered this assertion by insisting that the policy of the Nationalists of the Transvaal must remain absolutely unchanged with secession as one of the leading planks. It is, of course, not contemplated that secession should be by force if that can be avoided. But reliance is placed on the famous argument used by Mr. Bonar Law when Leader of the House of Commons on 30 March 1920, when opposing Dominion status for Ireland, that such a status meant inevitably the right to secede. Mr. Bonar Law<sup>3</sup> may have spoken more energetically than he meant to do, and legally there is no doubt that the idea of a simple Union Act assented to by the Crown as giving the right to independence is a chimera, but the broad fact that the United Kingdom would

<sup>1</sup> The Labour party's allegiance was seriously affected in 1926 by Gen. Hertzog's determination to have a national flag in which the Union Jack should have no place.

<sup>2</sup> In the Union Parliament, 28 Apr. 1925 ; cf. 16 March 1927.

<sup>3</sup> Keith, *War Government of the Dominions*, pp. 166 ff.

not wage war to prevent the secession of the Union if a substantial majority of the people desired such a result cannot seriously be denied. It is, on the other hand, clear that if secession brought about civil war, and the natives were involved, it would be impossible for any British Government to regard the matter with indifference, and South Africa is not well adapted to resist the argument of an effective naval blockade.

The matter is complicated as regards South Africa by the issue regarding the British Indian population. In this case there is no racial divergence of view among the European population. Some, perhaps mainly English, realize that the policy of expelling many persons born in South Africa to India is utterly immoral, and that, if India were a foreign country, it could not be persisted in except at the risk of war ; it would be interesting to consider what would happen if the Indians were Japanese subjects. Alone in the Empire is the proposition true of the Union that the principle that British Indians are entitled to be treated as becomes civilized men is deliberately and wholly denied. The doctrine of the Union is that of the South African Republic, which denied equality of the natives either before God or men, and in the long run there must arise the question whether India and the Union can remain associated within one and the same Empire. No serious statesman can deny that, if there had to be made a choice between India and the Union, the loss of the Union would be infinitely less serious to the Empire. Froude<sup>1</sup> long ago held that the possession of the Cape Peninsula represented the only vital consideration to the Imperial Government, and even that may be deemed to be of no fundamental importance. The future of the Union is heavily burdened by the question of the native population ; it has none of the possibilities of India, but loss to the Empire, which is deeply to be regretted, may well be obviated by wisdom in executing the compromise of 1927.

The case of India herself presents great difficulty. The fundamental fact which is ignored too largely in Indian movements for Svaraj is the necessity for the time being for the retention of British forces to secure the external safety and internal order of the Indian Empire. It is indeed true that under the British system Imperial troops were preserved in the

<sup>1</sup> *Short Studies*, iii. 367 ff., 395.

Dominions for a considerable period after self-government, and were only removed from the Union because of war exigencies. But the experience gained in the case of the Cape and of New Zealand would render it practically impossible for the Imperial Government to provide troops to be governed by an Indian Ministry which controlled relations with bordering States, with the Indian States, and was responsible for the internal peace of India with its perpetual and now renewed feud between Hindus and Mahomedans. That the Indian army could be officered by Indians and brought up to the standard of securing internal order and even perhaps frontier defence may be admitted, but the process has been so far extremely slow. It is probably true that the Indianization of the army has not been popular in British Army circles, but there has been a disappointing lack of readiness of the necessary candidates for the commissions available, no doubt for the reason that men who desire to secure careers for their sons find more remunerative opportunities for them in the Indian Civil Service, in which moreover an Indian has not to face the prejudice against him which he may find in the British army. But the fact remains that self-government without an effective Indian army is an impossibility, and no amount of protests or demonstrations or denunciations of the Imperial Government can avail to alter that fact. Similarly the deplorable recrudescence of sectarian bitterness affords a triumphant weapon to those who have systematically deprecated the reform movement on the score that Indians are only capable of despotic rule, a view which many able and well-meaning men have firmly held. So long, however, as India suffers from these two fatal sources of weakness, so long will independence be absolutely beyond her reach, and even autonomy within the Empire will be postponed. Moreover, the existence of these facts has served to influence disadvantageously Indian interests, for it has been used as an argument against extending self-government even in matters provincial, and has thus delayed the only means of learning how to work responsible government, actual experience of conducting it. As matters stand, Ministers have far too often been merely reduced by Governors to the position of officials, and rational party development has been hampered and delayed.

In Canada the movement for independence has gradually

evolved in the minds of a comparatively small group of men,<sup>1</sup> who find in independence the only final solution of their position compatible with self-respect. They thus in spirit agree with men like Goldwin Smith, Dilke in his earlier days, and Anthony Trollope. Mr. J. S. Ewart affords a specially interesting example of the tendency, for his views have gradually evolved from a proposal of a distinct kingdom of Canada—such as Sir J. Macdonald<sup>2</sup> contemplated as far as the name is concerned—and a mere personal tie through the King with the United Kingdom, to a Republic of Canada. The latter advice has been forced upon him, logically enough, by consideration of the great difficulties presented by the idea of a number of kingdoms under a personal union, but it must be admitted that the new form of proposal is less likely to attract Canadian favour than the former. For the former there was, of course, the obvious parallel of the union from 1714 to 1837 of the Crown of Hanover and the United Kingdom of Great Britain and Ireland. The two territories were absolutely distinct, the one a despotism, the other a constitutional monarchy, and the British throne was held on the express condition that there should be no obligation on the United Kingdom to engage in any war for the benefit of Hanover save by the express authorization of Parliament. There was, in fact, no necessary bond of union in their foreign policy. Hanover was involved with Prussia, Denmark, and Russia in their war against Sweden, but, though British vessels made a demonstration in the Baltic in order to protect British merchant shipping, there was never any breach of relations between the United Kingdom and Sweden; Peter's request for subsidies from the United Kingdom for the cost of the war was met with a refusal, as the United Kingdom was not involved, and her good offices were tendered to secure peace between Hanover and Sweden. But the parallel with a modern Kingdom of Canada is a poor one, for the position was rendered practicable simply by the fact that the King was a despot in Hanover, and controlled its policy; when the great

<sup>1</sup> See J. S. Ewart, *Kingdom of Canada; Kingdom Papers*, esp. No. 21, *Imperial Projects and the Republic of Canada* (1917); *Independence Papers* (1921); *Canada and British Wars* (1923).

<sup>2</sup> Cf. Pope, *Sir John Macdonald*, i. 312 ff.; *Confed. Doc.*, pp. 159, 178; Ewart, *Kingdom Papers*, ii. 367 ff.; Skelton, *Laurier*, i. 366 ff.

European Conferences which settled the affairs of Europe in 1814 and 1815 were held, Hanover as a distinct entity was simply ignored, and matters were settled by the King and his British Ministers, in whose determinations Hanover—like the other small German states—had to acquiesce. A Canadian Kingdom would have to be allowed an independent voice of its own, and it is extremely difficult to see how it would in the long run prove convenient to have two kingdoms—still less if other Dominions followed suit—with distinct policies and one king. That a single monarch could under constitutional rule act on the advice of different sets of Ministers seems out of all reasonable possibility.

The advantages which would accrue to Canada by an assertion of absolute independence are not very substantial. Mr. Ewart suggests that it would mean freedom from being involved in British wars in which Canada has no interest and a clearing up of relations as to India, which would be a benefit to the United Kingdom, which is apt to be held responsible for the unsatisfactory treatment of Indians in the Dominions. The first argument is of weight; the Monroe doctrine does afford Canada protection even if it is rather humiliating to have to rely on a foreign power for aid, and on the whole there is, even under the present system of the League of Nations, greater danger to Canada of being involved in war if she remains in the Empire than if she were an American Republic. Yet it must be conceded that the fact that Canada need not take part actively in any war, unless attacked, does remove much of the difficulty and minimize the disadvantage. Something may be said also for the improved status of an independent power, but it may be conceded that this has been largely changed by the creation of the League of Nations with its distinct recognition of the Dominions and the grant of the right of diplomatic representation at Washington. Nor is it now of importance to enumerate the mistakes of Canadian or British diplomats to prove that the connexion has been of disadvantage; the past is not a guide for the present, unless it is still vital, and the facts in any case are far from bearing out the contentions of Mr. Ewart. What indeed is clear is that save for the British connexion Canada must long ere this have been merged in the United States, with something of gain no doubt, but probably with more of loss.

The real difficulty, of course, is the feeling of status and the sense of nationhood. It was a commonplace with the early Separatists that the Colonial status was dishonouring,<sup>1</sup> and, if Dr. Parkin and Professor Leacock re-echo this view, they are doubtless in the right. But the problem is whether or not there can be secured within the framework of the Empire a status which is sufficiently important to satisfy the highest Canadian desire. It may be conceded that the position given in the League is only in part satisfactory, and that more than this is required. Canada must be made to feel that she can participate effectively in moulding foreign policy, so that the British action on any subject is really hers as much as British. Admittedly this is yet far from accomplishment, but that is explained simply enough by the fact that Canada sees no reason for providing herself with means of offence or defence, and that being so she cannot undertake to seek to offer advice which shall be of any serious weight. The foreign policy of the Empire could be carried on in co-operation without federation of any kind by effective agreement, but it would impose on the parties to the agreement definite obligations and understandings which would not now be accepted by the Dominion. What is clear is that Canada is in no wise yet prepared for the step of independence, or of effective co-operation with the United Kingdom, and, therefore, her status remains theoretically unsatisfactory. But when a country has many vital internal problems to dispose of, she need not be pressed to secure the settlement of the more remote issue of national status.

In Australia the movement for republicanism was somewhat unpleasantly prominent during the war period, when it succeeded towards the close of the summer and the winter of 1918 in paralysing gradually the recruiting efforts of the Commonwealth. But there is no evidence of any seriously thought out conception of true independence, for the necessity of external aid to protect the enormous and thinly populated area is obvious. The effort of the Prime Minister has clearly been to secure more effective consultation with the United Kingdom on

<sup>1</sup> Mr. Meighen's action in July 1926 proves that many Canadians still like the rank of Colonials. He, it will be remembered, dissented violently from the Canadian repudiation of titles. Froude held that the Colonies could be kept loyal by C.B.'s; *Oceana*, pp. 194, 339.

foreign matters, so that the Commonwealth may feel that she is securing due regard for her wishes in matters international. Nor does there seem to be the slightest serious movement in Governmental circles to go beyond this position.

In the view of some advocates of Dominion independence the result of the movement would not be mere disruption of the Empire, but rather the creation of a British League of Commonwealths within the League of Nations. The several parts of the Empire would become absolutely independent States, but they would conclude among themselves agreements,<sup>1</sup> which would, of course, be subject to the approval of the League, but which would be assured of that approval, as they would essentially be subservient to the purposes of the League and fall under the same rule as has been applied to the many pacts between members of the League concluded of recent years, such as the French agreements with the succession States. However attractive such a process of development may be in theory, it is far from certain that this will be the line of development. As the Conference of 1926 showed, there is a strong feeling throughout the Empire in favour of elasticity and of avoiding any set arrangements, and it is difficult not to feel that under the present condition of things and the enormous potentialities of Dominion development in wealth and population it would be premature to seek any definite settlement. The illogicalities of the Empire may prove annoying to legal minds,<sup>2</sup> but they are a healthy sign of a capacity of growth to which it is idle to predict any definite bounds.

### § 3. *Practicable Reforms in Dominion Status*

In these circumstances it is clear that there is no room for any wide changes at the moment in the conduct of Dominion affairs. There remain, however, a number of minor matters in which progress could be made without raising any great difficulties. With the progress of the Dominions in political experience it seems desirable, and the Conference of 1926 has

<sup>1</sup> Cf. J. W. Dafoe, *The New Era in Canada*, pp. 279–99, for an early and clear expression of this view as against the ‘hallucinations’ of federalism.

<sup>2</sup> Prof. C. D. Allin’s interesting comments (e.g. *Michigan Law Review*, xxiv. 249 ff.) show how chaotic the situation appears to a lawyer familiar with federal constitutions.

now accepted the view,<sup>1</sup> that the personal responsibilities of the Governors-General and the Governors should be taken away, and that they should be required to conduct their duties as heads of the Dominion Executive on the principles which regulate the action of the Crown in the United Kingdom. They should, therefore, cease to be under any legal liability for acts of an official character, and they should be released from any personal responsibility as regards the exercise of the prerogative of mercy.<sup>2</sup>

It can hardly be contended that there is any justification for preserving indefinitely the control of Dominion legislation by reservation and disallowance. There should also be granted to the Dominions legislative power as to shipping on the same terms as to the United Kingdom, and the prudent exercise of these powers should be secured by agreement, which would also be necessary to secure that the general removal of the indefensible territorial restriction of the operation of Dominion laws should not lead to confusion. Moreover, the power of constitutional alteration otherwise than through the intervention of the Imperial Parliament ought to be secured to Canada. The removal of the supremacy of Imperial legislation has also been contended for, but that involves the assumption of a final settlement of the affairs of the Dominions and the United Kingdom on a definite basis, which would ensure that legislative supremacy would never have to be invoked, and the retention of such supremacy would appear essential for a time if the right to require reservation and to disallow were surrendered.

Relations between the Dominions and India can be made effectively friendly only by the acceptance, on the one hand, of the absolute right of each part of the Empire to regulate settlement, subject to the duty to permit visits for commercial, educational, and pleasure purposes, and on the other hand by the provision that lawfully domiciled British Indians shall be placed on an equal rank with other subjects and shall not be penalized, as in all the Dominions to some slight degree, but very gravely in South Africa, on purely racial grounds.

<sup>1</sup> See Part VIII, chap. iii, § 8.

<sup>2</sup> For the elimination of the Governor-General in certain respects as a channel of communication, see also Part V, chap. v, § 9.



If the judicial appeal to the Privy Council is to be preserved without entailing loss of self-respect on the Dominions, it can only be by the merger of the Court in one Court of Appeal for the whole Empire and the admission of Dominion judges to full membership of the Court in lieu of confining them to hearing cases from the Dominions alone.

Arrangements for representation of the Dominions at international conferences and the making of treaties are largely now satisfactory,<sup>1</sup> and efforts are unquestionably made to secure them full information on all foreign issues. The creation of effective departments in all the Dominions to record these communications has been a real step in advance, but something more might be done to secure that the Dominion is represented in London by a minister or officer fully cognizant of Dominion views on foreign issues. The occasional use of the High Commissioner, who may be far too deeply burdened with other business to become expert in foreign affairs, is only a second-rate solution; and there was more force in the offer of the Imperial Government in 1912 than has been regularly recognized. A Minister Resident would serve the functions of an ambassador and, if preferred, a permanent officer for trade and similar duties could be maintained in London. But the essential point is that the representative of any Dominion ought to be a person who is wholly in the confidence of his Government, not a member perhaps of a former Government who has been appointed to the High Commissionership, and who may not be in the slightest sympathy with the Ministry, or who may by reason of his former office be inclined to express personal rather than Governmental views.<sup>2</sup> More effective communications between Dominion Governments themselves seems also to be desirable.

The development of common schemes of defence definitely based on war co-operation is obviously essential. The idea of really independent Dominion navies was never practicable, and is doubtless no longer seriously maintained. It cannot, for instance, be left doubtful whether on a state of war being declared the Australian navy would be handed over to

<sup>1</sup> See Part V, chap. v, § 9.

<sup>2</sup> For the idea of British representatives in the Dominions, see Part VIII, chap. iii, § 8.

Imperial<sup>1</sup> control or not. No Admiralty could consent to plan the defence of Australia on such a basis. Co-operation in all matters is essential, and the Imperial Conference serves now as formerly as the most formal and perhaps the most useful of methods of co-operation, though it has to be supplemented by the everyday work of the Governments composing it.

<sup>1</sup> Ultimately this authority must represent the Dominions as well as the British navy; cf. Borden, *Canadian Constitutional Studies*, pp. 157 f.; above, p. 1012.

## II

### IMPERIAL CO-OPERATION

#### § 1. *The Colonial Conference of 1887*

THE outcome of the Imperial Federation movement in the period after 1883 was the decision of the Imperial Government to summon a Conference representative of the whole Empire, including the Crown Colonies, in 1887.<sup>1</sup> The constitutional issue of federation was indeed definitely ruled out, for the obvious reason that it had no official support in any colony ; it was made clear by Mr. Stanhope in the invitation of 25 November 1886 that there was no question of a formal meeting of plenipotentiaries, but rather a gathering of leading men from the Colonies to consider such issues as that of military defence, brought to a point by the eagerness of the Colonies to afford aid in Egypt, and the forging of closer economic links by improvement of communications. The Conference was, therefore, a rather mixed gathering of notables ; it was formally opened in the presence of the Prime Minister and other Ministers, and many interesting matters were debated. It reached positive results in regard to the defence of Table Bay, and the fortification of Simon's Town at Imperial expense ; the arrangement for an Australasian squadron with contributions of £126,000 from the Colonies ; the continuation for a period of neutrality under an Anglo-French Naval Commission in the New Hebrides, and the annexation of New Guinea, which was effected in 1888. It was, however, not found possible to arrange for the defence of King George's Sound or Torres Straits. Mr. Hofmeyr for the Cape made an important suggestion that, in order to encourage Empire trade and promote defence, a duty should be levied throughout the Empire on foreign goods, the proceeds to be devoted to defence.

Trade questions discussed included the desirability of uniformity of laws as to merchandise marks and patents ; the effect of foreign bounties on the sugar-producing colonies ;<sup>2</sup> the ideal of Imperial penny postage—which the Colonies did

<sup>1</sup> *Parl. Pap.*, C. 5091, 5091 I.

<sup>2</sup> Later dealt with, Cd. 1470, 1535, 1632 (1903).

not approve;<sup>1</sup> and of a new cable to Australia, on which nothing was effected. Legal issues involved the question of enforcement of colonial judgements and orders in bankruptcy and winding up of companies; recognition of colonial wills, effected by the *Colonial Probates Act*, 1892; admission of colonial stocks as trustee securities, conceded in 1900;<sup>2</sup> stamp duties on the transfer of colonial inscribed stocks, on which concessions were made; and marriage with a deceased wife's sister, on which no agreement could be reached.

Constitutional issues discussed, all without much result, were the assimilation of colonial to British practice in the matter of dissolution; the exercise of the prerogative of mercy; the desire of the Colonies to be allowed to make commercial treaties with foreign powers—a right incorrectly stated to be enjoyed by Canada;<sup>3</sup> and a change in the royal titles to include mention of the Colonies, which on reference to the Colonial Governments proved not to be desired.<sup>4</sup>

### § 2. *The Colonial Conference of 1894*

The second Conference<sup>5</sup> was summoned by the Canadian Government and met at Ottawa in 1894, when Canada, the Australasian colonies save Western Australia, and the Cape were represented as well as the United Kingdom. It arose primarily out of the proposal mooted in 1887 for the construction of a cable between Canada and Australasia, but its most important work was the passing of resolutions favouring Imperial preference, the Colonies to start the scheme *inter se*, as the United Kingdom was still wedded to free trade; the passing of Imperial legislation to permit of the Australasian and other colonies arranging preferential tariffs with the United Kingdom or one another; and the denunciation of treaties with Belgium of 1862 and the German Zollverein of 1865 preventing

<sup>1</sup> The Colonies represented their desire to have representation if they joined the Postal Union, and this was arranged; see *Parl. Pap.*, C. 1666 (1877); 2050, 2309 (1878-9); 5040 (1887).

<sup>2</sup> See *Parl. Pap.*, H. L. 189, 1877; C. 6278 (1890-1); H. L. 169, 1892; H. C. 276, 1893; H. C. 300, 1900.

<sup>3</sup> Jebb, *Imp. Conf.*, i. 171 f., 379 ff.

<sup>4</sup> It was altered in 1901; 1 Edw. VII, c. 15; *Parl. Pap.*, Cd. 708.

<sup>5</sup> *Parl. Pap.*, C. 7553, 7632, 7824; for the cable, Ewart, *Kingdom of Canada*, pp. 275-88; *Canada Sess. Pap.*, 1900, Nos. 55-55b.

the Colonies giving preferential treatment to the United Kingdom if they desired, and possibly also to other colonies. The attitude of Lord Ripon in his replies of 28 June 1895 to all these views was negative, save that he agreed to secure legislation, which was later carried, to free the Australian colonies from difficulties under the Act of 1873 as to reciprocity agreements with other colonies, on the understanding that any Bills of this kind should be reserved. The treaties, he argued, applied only to preference granted to the United Kingdom, and it would be unwise to denounce them in view of the injury to British trade which might result.

The Conference agreed on the desirability of having rapid services on the Atlantic, and from Vancouver to Sydney, and to the making of a Pacific cable with, if possible, a neutral landing place in Hawaii, but this plan was spoilt by the annexation of those islands by the United States, but the cable was successfully laid ultimately from Auckland to Vancouver via Norfolk Island, for Australia, Fiji, and Fanning Island.

### § 3. *The Colonial Conference of 1897*

The next Conference<sup>1</sup> was formally summoned by the Imperial Government in connexion with the sixtieth anniversary of Queen Victoria's coronation; it was attended by the Prime Ministers of all the self-governing colonies, Canada, the six Australian colonies, New Zealand, the Cape and Natal, and Newfoundland. The relations of the Colonies and the Empire were now formally reviewed, and held for the time being satisfactory, though Mr. Seddon for New Zealand and Sir E. Braddon for Tasmania desired more formal arrangements in order to secure the Colonies a due share in Imperial interests. But it was admitted that a voice in decision meant a share in the cost of carrying out decisions, and this the Colonies were not prepared to consider. They desired, however, the continuance of the system of Conferences. Approval was expressed of the political federation of contiguous colonies, an allusion to the Australian federation then approaching completion.

Foreign relations were touched on mainly from the point of view of commerce. The request of 1894 for the termination of the Belgian and German treaties was repeated, and, as it was

<sup>1</sup> *Parl. Pap.*, C. 8596.

backed by a promise of consideration whether the Colonies might not inaugurate preference by giving it to the United Kingdom, the request was duly acceded to.<sup>1</sup> The question of acceptance by the Colonies of the Anglo-Japanese Treaty of 1894 was mooted, but Queensland<sup>2</sup> alone with Newfoundland and Natal desired to adhere, while Newfoundland also accepted the proposal for inclusion in the arrangement with France. Defence elicited a discussion of the maintenance of the Australasian squadron, accepted readily by all save Mr. Kingston for South Australia, who put in lieu before the Conference a scheme for forming in Australia a branch of the Royal Naval Reserve. The Cape offered a battleship, later commuted to £30,000 a year, to which Natal added £12,000. The Colonial Defence Committee asked attention to certain details of preparation for emergency, and the Premiers undertook to consider the issue of an occasional interchange of units between the Colonies and the United Kingdom. Immigration was discussed fully owing to the Australasian anti-Asiatic campaign, and it was announced that it was hoped to devise a method preventing the Colonies being flooded by Asiatics, while avoiding discriminations on the score of race and colour alone. Commercial questions included a discussion of penny postage, which the Cape and Natal pressed and which was arranged at a Postal Conference of June-July 1898; the Pacific cable, on which the United Kingdom made clear its interest solely on colonial grounds, and which was ultimately undertaken and completed in 1902,<sup>3</sup> the Governments concerned arranging a joint working of the cable; and the removal of restrictions on investment by trustees in colonial securities.

#### § 4. *The Colonial Conference of 1902*

Like the preceding this Conference was summoned for the celebration of a great royal event, the coronation of Edward VII, and, as on the former occasion, only the opening speeches and resolutions were published.<sup>4</sup> The Conference was for the first time placed on a definite footing; it was agreed that Confer-

<sup>1</sup> *Parl. Pap.*, C. 9423; Cd. 1630, 1781 (German retaliation on Canada); Canadian Acts 60 & 61 Vict. c. 16; 61 Vict. c. 37; 63 & 64 Vict. c. 15; Cd. 1299.

<sup>2</sup> Denounced in 1908 by the Commonwealth. Canada adhered in 1906; Cd. 3157.

<sup>3</sup> *Parl. Pap.*, C. 7553, 7632, 9247, 9283; Cd. 46, 2663.

<sup>4</sup> *Parl. Pap.*, Cd. 1299.

ences should be held not less often than one in four years, to be attended by the Secretary of State for the Colonies and the Prime Ministers of the self-governing Colonies ; extraordinary meetings might be summoned, the next regular Conference to be held not sooner than three years after. It was agreed that, before commercial treaties were negotiated, the view of the Colonies should, if possible, be obtained. Defence discussions resulted in the increase of the Australasian subsidies to the squadron to £200,000 for Australia and £40,000 for New Zealand, in return for an improved squadron and the formation of a branch of the Royal Navy Reserve ; the Cape and Natal increased their grants to £50,000 and £35,000 for the general maintenance of the navy ; Newfoundland consented to contribute £3,000 a year and a capital sum of £1,800 to fit up a drill ship in connexion with the establishment of a branch of the Royal Naval Reserve of 600 men. Greater facilities for the grant of commissions and naval cadetships to young colonials were conceded. As regards trade the Colonies agreed that they should give preferences to the United Kingdom, Canada promising to increase her general preference of  $33\frac{1}{3}$  per cent., New Zealand to give 10 per cent., the Cape and Natal 25 per cent., and Australia an undefined amount, promises implemented in substance in due course,<sup>1</sup> while the United Kingdom was urged to accord preference, a resolution which brought about the introduction of the issue into British political life by its acceptance by Mr. Chamberlain and his ultimate resignation from the Government in order to press it on the people. In Mr. Chamberlain's hands, however, the proposal took a turn which the Colonies declined to accept, that of the calling a halt in the development of new colonial industries, without which Mr. Chamberlain held that colonial preference could not be effectively accorded. The principle of Imperial preference in governmental contracts was approved, and attention was called to the desirability of closing the coasting trade—including in that term inter-imperial trade—to the vessels of powers which reserved their own coasting trade ; and to the importance of furthering British shipping. Minor matters were uniformity in weights and measures, patents, right of purchasing privately-

<sup>1</sup> *Parl. Pap.*, Cd. 2326 ; H. C. 310, 1903 (Canada) ; Cd. 1599, 1640 (1903) ; 2024 (1904) ; 2977 (1906) ; 3524, pp. 317 ff.

owned cables, and cheap postage on newspapers and periodicals, which was arranged with Canada in 1906 as a matter of Imperial importance in order to counteract the political and social effect on the Dominion of an exclusive reliance on American publications.

§ 5. *The Proposals for an Imperial Council*

On 20 April 1905 Mr. Lyttelton<sup>1</sup> submitted to the Colonies a proposal to rename the Colonial Conference as Imperial Council; to continue its constitution as in 1902 with representation of India by the Secretary of State when its interests were concerned, and of the self-governing Colonies by their Prime Ministers, while other Ministers of the Imperial and Colonial Governments might attend as in 1902 when matters affecting their special spheres were under consideration. It was not proposed formally to define the composition or functions of the Council. But it was proposed that a permanent body should be created to prepare matters for its consideration and deal with its resolutions, the staff representing the whole of the members, while the secretarial work would be paid for by the Imperial Government; the Secretary of the proposed Commission would conveniently act as Secretary to the Imperial Council when it met. The analogies of the Committee of Imperial Defence and a Royal Commission were suggested as helpful in elucidating the idea; the body would only act on references by the Conference or by the Imperial Government and one or more Colonial Governments, and would have no executive functions. The response of the Cape, the Commonwealth, and Natal was hearty and accordant; New Zealand did not reply; Newfoundland feared lest the Commission would attain executive power, and Canada preferred Imperial Conference as a style and was definitely afraid lest a permanent 'Commission might conceivably interfere with the working of responsible government'. The matter was left over by Mr. Lyttelton for discussion at the Colonial Conference due for 1907, and, as the Government fell in 1905, it devolved on Lord Elgin to reconsider the position. He was not in favour of the idea, but left it for the Conference of 1907 to debate.<sup>2</sup>

<sup>1</sup> *Parl. Pap.*, Cd. 2785. Cf. Ewart, *Kingdom of Canada*, pp. 217-24.

<sup>2</sup> *Parl. Pap.*, Cd. 2975.



§ 6. *The Colonial Conference of 1907*

Before the Conference of 1907 met the Canadian Government had pointed out that it would be convenient if other Ministers than the Prime Minister were made members, adducing the fact that in 1902 Australian and Canadian Ministers had actually taken part in the proceedings.<sup>1</sup> The Secretary of State, while leaving the issue to the Conference, concurred in the convenience of the proposal, and such Ministers did actually attend, it being agreed that any voting must be by colonies. The Conference differed from its predecessors in having no ceremonial connexion, and in publishing by far the greater part of its papers.<sup>2</sup> It was agreed to rename the Conference as Imperial Conference ; that it should be constituted of the Prime Ministers of the United Kingdom and the Dominions, India being left out, that the Secretary of State for the Colonies should be a member *ex officio*, and preside in the absence of the Imperial Prime Minister ; that other Ministers might attend, but any discussion save by agreement should be confined to two, and each Government should have but one vote. In case of matters which would not be postponed to the regular Conference, or were of minor importance, or required detailed consideration, subsidiary Conferences could be summoned. A permanent secretarial staff was to be established in the Colonial Office to prepare matters for the Conference, attend to its resolutions, and conduct correspondence, a characteristically feeble device<sup>3</sup> to meet the more radical suggestion of Mr. Deakin for a composite and truly Imperial secretariat.

The chief constitutional issue discussed was the establishment of an Imperial Court of Appeal to merge the House of Lords and the Judicial Committee, which the Imperial Government negatived. It was agreed, however, to consolidate and simplify the existing rules as to appeals, and to secure uniformity as far as possible, while it was also agreed to delegate to Colonial Courts the right of allowing appeals by special leave. General Botha also obtained approval of a very far-reaching decision that, when colonies were federated or united, and there was one final

<sup>1</sup> *Parl. Pap.*, Cd. 3340.

<sup>2</sup> *Parl. Pap.*, Cd. 3523, 3524.

<sup>3</sup> See *Parl. Pap.*, Cd. 3795 ; Cd. 5273, pp. 1-12. Admittedly the thing was a futile farce, no change in substance being made.

Appeal Court, no appeals might be allowed to the Privy Council save from it, an arrangement carried out in the Union Act of 1909. On treaty matters the Colonies pressed for efforts to render uniform the conditions imposed by commercial treaties, and for the removal of any barriers—there were none—to inter-imperial and intercolonial preferences.<sup>1</sup> Defence was marked by discussions of the naval agreement with Australia, concurrence in the appointment of an Imperial General Staff and in the use of the Committee of Imperial Defence, on which Colonial representatives might sit, to consider matters affecting defence issues. Minor questions discussed were uniformity of organization, arms and ammunition, exchange of officers, cadets, military schools, and rifle clubs. Imperial preference was pressed at enormous length by Mr. Deakin, but refused by Mr. Churchill, little prescient of his future recantation, with impolitic violence of expression ; the Imperial Government also refused to reaffirm the resolution of 1902 as to coasting trade without the omission of the proposal to treat inter-imperial trade as coasting trade. Uniformity of legislation as to patents, trade-marks, and companies, and the examination and authorization of surveyors<sup>2</sup> was recommended ; penny postage as an international ideal was extolled, and the restriction of cable licences to twenty years with control over rates was suggested. Proposals for an Imperial travel, transport, and mail service, the ‘ All-Red Route ’, were broached, and a new topic was discussed, Imperial naturalization.

### § 7. *The Execution of the Resolutions of 1907*

It was a distinctive feature of the Conference of 1907 that its resolutions were effectively followed up and developed. An interdepartmental committee examined the question of Imperial naturalization in 1908. In 1909, as already recorded, the first subsidiary Imperial Conference of Naval and Military Defence<sup>3</sup> was held, involving the resolution to create a great Eastern Fleet, and to continue co-operation in producing effective co-ordination of military preparations through an Imperial General Staff. In 1910 the old question of copyright

<sup>1</sup> Cd. 3523, p. 68. Cf. Cd. 3395, 3396, 4080.

<sup>2</sup> A Conference was held in May 1911 ; Cd. 5273, pp. 124–35 ; Cd. 5776.

<sup>3</sup> Part V, chap. x. See, for the correspondence, Cd. 5273.

was disposed of by another subsidiary Conference which paved the way for the acceptance by the Empire of the Berne Convention of 1908 and the *Copyright Act*, 1911.<sup>1</sup> Questions as to surveyors were discussed at a technical Conference in 1911. There was wholesale assimilation of the terms of appeals to the Privy Council from the Australian States, the Canadian Provinces other than Ontario and Quebec, New Zealand, and Orders as to procedure only were issued in respect of the Commonwealth and the Union of South Africa. Something was done to assimilate laws as to patents, trade-marks, and companies. Trade Commissioners were appointed to the Dominions, in order to perform functions in the way of promoting British trade similar to those of Consuls in foreign countries. Dominion trade statistics were improved in order to discriminate the countries of import. The Commonwealth was allowed to have its own silver currency, a reduction was secured of fifty centimes a ton in the Suez Canal dues, the four great Dominions adhered to the Radiotelegraphic Convention of 1906, and a bill was prepared to facilitate the marriage in England of persons arriving from the Dominions.

<sup>1</sup> Part V, chap. viii ; *Parl. Pap.*, Cd. 5272.

### III

## THE IMPERIAL CONFERENCE

### § 1. *The Conference of 1911*

#### (a) *The Agenda in the Dominion Parliaments*

THE Conference of 1911 was marked by the early preparation of agenda<sup>1</sup> and the desire shown in the Dominion Parliaments to express views regarding them. Canada made no proposals, for which Sir W. Laurier was sharply attacked by Sir G. Foster on 20 April 1911 in the House of Commons, who eulogized the work of the Secretariat instituted under the resolution of 1907, and pointed out how much Canadian inattention had delayed results. Sir W. Laurier praised the Secretariat, and held that there was still so much left over from 1907 to do that it was better not to raise new issues; he indicated Canadian interest in the All-Red Route, but Australian reluctance, and hoped that he might be able to secure closer trade relations with Australia by discussion at the Conference. He said nothing of a point he had once proposed to raise, the quasi-diplomatic status of Consuls, emphasized as it was by the use of them as intermediaries in the semi-treaty negotiations of 1910. But he stressed the desirability of securing Imperial naturalization for Americans in Canada. Australia proposed an elaborate list, of which an Imperial Court of Appeal, Imperial Defence, the status of Dominion navies, and an attack on the Declaration of London were the chief items. On 25 November 1910 they were discussed by Mr. Deakin, who eulogized the Conference as the best means of securing Australia a voice in Imperial issues; urged the appointment of a Secretariat under the Imperial Prime Minister in which the Dominions should be represented; pressed for the distinction between Dominion and Crown Colony matters; and insisted on the necessity of an Australian policy for the Pacific. He favoured an Imperial Court of Appeal. In New Zealand Sir J. Ward brought forward proposals for an Imperial Council representative of all parts of the Empire to advise the Imperial Govern-

<sup>1</sup> *Parl. Pap.*, Cd. 5513.

ment on Imperial issues, and for the division of the Colonial Office into a Dominions and a Crown Colonies Department under a Secretary of State for Imperial Affairs, the High Commissioners to take the place of the Governors as means of communication between the Imperial and Dominion Governments. On 23 September 1910 in the House of Representatives Mr. Herries argued in favour of Parliamentary discussions of agenda before any delegation went, on the score that the representatives of New Zealand would thus carry much greater weight at the Conference, and on 23 November Mr. Taylor sounded a note of warning lest the Conference seek to interfere in the internal affairs of New Zealand. Sir J. Ward insisted on the first occasion that the Government must express its opinion at the Conference subject always to the necessity of submitting to Parliament for approval any resolution arrived at, while he assured Mr. Taylor that the Conference would be quite firmly told that it must not interfere in Dominion internal affairs. Newfoundland suggested an Atlantic steamship service, as a link in the All-Red Route.

The Conference met from 23 May to 20 June; thirteen ministers attended, the British Prime Minister presiding on most occasions, and Sir W. Laurier on one; no other Imperial ministers than the Colonial Secretary were present save on occasions when matters affecting their departments were considered. The proceedings were secret, Sir J. Ward's proposal to the opposite effect being negatived, but a very full disclosure was made in July.<sup>1</sup>

### (b) *The Resolutions of the Conference*

The many resolutions achieved may be summarized thus:

(i) *Constitutional Questions*. Sir J. Ward's proposal<sup>2</sup> for an Imperial Council was presented by him in the quite changed form of a proposal for an Imperial Parliament charged with the issues of war and peace, foreign policy, and treaties affecting the

<sup>1</sup> *Parl. Pap.*, Cd. 5745, 5746-1, 5746-2.

<sup>2</sup> Sir W. Laurier's sneer (Skelton, ii. 342 n.) at Sir J. Ward had better have been left in oblivion. But since it has been made public the writer must confess that his presence as Assistant Secretary at the Conference convinced him of the vanity of attributing statesmanship to politicians of high repute, and played a decisive part in his decision in 1914 to accept an office which, though conferred by the Crown, affords complete liberty of action.

Empire. He suggested the creation of an Imperial House of Representatives of 297 members (United Kingdom 220, Canada 37, Australia 25, South Africa 7, New Zealand 6, and Newfoundland 2) and an Imperial Council of Defence of 12 members, two for each unit; the two bodies would appoint an Executive of 15 to deal with the matters specified. The Parliament was to have no taxing power, but the amounts necessary were to be raised and paid by the Dominions as they thought fit. The total was to be based on the theory that the Dominions should pay 50 per cent. less per caput for defence purposes than the United Kingdom, and a definite scheme was submitted for the creation of a great fleet of Dreadnoughts. The representatives of the Dominions all negatived the proposal of New Zealand, on the score that it would infringe their autonomy, while Sir W. Laurier was caustic at the expense of a body which could spend but not raise revenue. Mr. Asquith, taken by surprise at the change of proposal, delivered a very irrelevant allocution, from which, however, it could be gathered that he was quite unprepared for an Imperial Parliament, though his arguments were really directed to the original proposal of an Imperial Council.

The Colonial Office emerged from the discussions unscathed. The Imperial Government did not desire to pass over the Governors as channels of communication, and South Africa in special was dubious as to the High Commissioners being given political functions, though Mr. Fisher for Australia wished frequent discussions by the High Commissioners of foreign issues with the Secretary of State for Foreign Affairs, and suggested that the Dominions should be placed under the Ministry of Foreign Affairs. The South African proposal for placing the Dominions under the Prime Minister as a mark of status was negatived by Mr. Asquith on the quite ludicrous ground that he would have a thousand papers to study annually. An offer by the Imperial Government to constitute a standing committee of the Imperial Conference, to include the High Commissioners, was welcomed by Australia and New Zealand but negatived by South Africa, Newfoundland, and Canada, and the offer to create two Permanent Under-Secretaries, one for the Dominions, was not considered necessary. On the other hand, it was agreed that ministers from the United Kingdom and Dominions should exchange visits, and that it might be well

to hold an Imperial Conference in a Dominion, though Sir J. Ward and General Botha stressed the disadvantage which would arise of the Dominion minister missing the opportunity of forming acquaintance with Imperial ministers.

The discussion of an Imperial Court of Appeal had no result of importance. The Commonwealth desired a single Court to include the functions of the House of Lords. The Imperial Government would not concede this, insisting instead that the two Courts, the Lords and the Privy Council, never really gave different judgements on points of principle ; that both were strongly manned ; that the Government was willing to add two further paid members to both, to fix the quorum at five in lieu of three, and to constitute the Privy Council in Dominion appeals as each Dominion wished. But New Zealand alone was anxious to send a judge to England to sit on the Council, as was possible under an Act of 1908 ; the Commonwealth view was that all appeals should be decided locally, and in any case it was not worth sending a judge ; the Union had hardly any appeals, Canada held the matter affected the provinces deeply and should be left alone, and Newfoundland wished no change. All that was agreed was that the Privy Council should in future not give a single judgement, but individual members might express dissent, but later this proposal was unanimously repented of in the Dominions, where reflection showed that the value of the judgement was often simply due to its being by one voice.

Naturalization resulted in a most important agreement after the Dominion representatives had vainly sought to induce the Imperial Government to accept colonial naturalization as having Imperial validity. It was agreed to create a form of naturalization based on the Imperial rule of five years' residence, which would be accepted throughout the Empire, leaving local naturalization on easier terms unaffected. It was also agreed that the Dominion powers as to immigration and as to treating differentially classes of British subjects should remain unimpaired.

(ii) *Foreign Relations.* The great achievement of the Conference was reached on the issue of the Declaration of London, when it was agreed that in future instructions to British delegates to Peace Conferences should be drafted in communi-

cation with the Dominions, and draft conventions there arrived at should be circulated to the Dominions before signature, while a similar procedure, when time and circumstances permitted, should be adopted as regards other international negotiations. Sir W. Laurier,<sup>1</sup> as usual, made it perfectly clear that he did not claim to be consulted on international relations as a matter of right, other than issues immediately affecting Canada, for such right to be consulted implied a duty to assist if war should arise out of the policy determined on after consultation. On the other hand, he pressed successfully for the decision to open negotiations with all the powers with which treaties existed binding the Dominions and not containing clauses of facultative withdrawal for the Dominions, in order to secure such privileges. But it was agreed that the Imperial Government should not be expected to denounce any existing treaties if the countries concerned would not concede what was asked for, but the issue would be raised again at the next Conference. Australia had raised the same point because of the difficulty experienced in 1906 when a British preference could not be restricted to goods imported in British ships, though it must be admitted that in that case the issue had been complicated by a further restriction to British ships not manned by Asiatic labour.

(iii) *British Indians in the Dominions.* The position of British Indians was discussed in connexion with the efforts of Australia and New Zealand to exclude them from ships visiting their coasts and elicited from Lord Crewe<sup>2</sup> an unusually effective statement. He conceded the right to exclude Indians from the Dominions, for he recognized the mental and physiological factors which created race prejudice, and he conceded that Indian competition was economically too severe for the Dominions to resist. But he stressed the fact that it was unjust to talk necessarily of a lower standard of living, because an Indian did not demand strong drink and an expensive meat diet such as Australia loves. But he could see no justification for seeking to prevent Indians visiting the Dominions in ships, none

<sup>1</sup> Skelton, ii. 343 ff., discusses Sir W. Laurier's attitude to Imperial unity, but he ascribes to him too constructive a mind. All that he was determined to do was to preserve Canadian autonomy; he may have looked forward to independence as Mr. Ewart claims, but that was no decided view; he was content with a policy for his own time, and that merits no censure.

<sup>2</sup> Cd. 5745, pp. 396-400.



for excluding mere temporary visits, and none for imposing disabilities on Indians lawfully resident in the Dominions on the score of race or colour. He stressed the religious and intellectual greatness of India, her glorious traditions and her unswerving loyalty to the Crown. None of the Dominion Premiers sought to answer the arguments, but they insisted on the economic impossibility of competing with Indian labour; Sir W. Laurier did not like differentiations, but, if Indians had no vote in British Columbia, neither had women in England; Mr. Malan, for South Africa, pointed out that the racial question was made complex by the presence of Indians. No solution was achieved, but it was made clear that the New Zealand effort to exclude lascars from the trade with Australia would not succeed, while Australia was legally at liberty to impose what conditions she pleased on her coasting trade.

(iv) *Naval and Military Defence.* In the closest connexion with defence questions there took place at the Committee of Imperial Defence a full discussion of foreign relations in their relation to British defence preparations, the Dominion Prime Ministers receiving full information regarding the German menace to European peace, which in the isolation of distance they had hardly realized.<sup>1</sup> Otherwise little progress was made as to defence in its military aspect, the Conferences of 1907 and 1909 having left no new matters of principle to be raised. On the other hand, the status of Dominion navies was for the first time properly explored, and the way made ready for the *Naval Discipline (Dominion Naval Forces) Act* of 1911. The Conference refrained from any discussion of General Botha's suggestion that from any naval subsidy there should be deducted the amount of local expenditure on naval defence preparations. The proposal was in fact dictated mainly by the Boer dislike of the small naval contribution of £85,000 a year, and the matter was clearly negligible, had not it originally been coupled with the distressing proposal to abandon the British preference in exchange for expenditure on naval and military defence. Such a principle applied generally would have meant nothing but loss to the British Government, which was unfeignedly glad

<sup>1</sup> The proceedings being secret their effect was lost in large measure, as the Dominion Premiers failed to realize the need of educating their people in the duty of readiness for war. The same defect remains unremedied in 1927.

when General Botha withdrew his bombshell, not until, however, it had been used against the Government by the Opposition.

(v) *Emigration.* Complaints of insufficient Imperial co-operation in emigration were effectively disposed of by Mr. John Burns, who showed that, whereas in 1900 only 33 per cent. of emigrants went to the Empire, the proportion had increased to 68 per cent. in 1910, and to 80 per cent. in the beginning of 1911 ; the annual emigration of 300,000 represented all that the United Kingdom could spare, and was only possible by reason of a lower death rate and saving of infantile life ; great efforts were made by the Emigrants' Information Office to direct emigrants to the Empire, and these would be continued. The statement was accepted by the Dominions, which had just before declined to make use of the Labour Exchanges in the United Kingdom as a means of securing the services of persons desired by employers in the Dominions, an attitude evidently dictated by fear of accusations of promoting an influx of skilled workers, the Dominions desiring only the pick of British agricultural workers, whose names would not be on the registers of the Labour Exchanges.

(vi) *Commercial and Economic Questions.* The Conference learned with pleasure of the Postmaster-General's success in securing lower cable rates for deferred cables, but was less pleased at his refusal to agree to the purchase of a land line across Canada and a new Atlantic cable. On the other hand, wireless telegraphy for the Empire was agreed on, none realizing what troubles were to be experienced ere the result was to be achieved. Penny postage as an international arrangement was ruled impossible on grounds of expense, but the Imperial postal order system was commended for use in Australia and extension in Canada. The difficult issue of Imperial preference was shelved by the appointment of a Royal Commission to perambulate the Empire, report on its resources and the possibilities of increased trade, with due regard to the settled fiscal policy of each part, and to this Commission—which was fated to spend much time, money, and labour for nothing—was assigned the consideration of the All-Red Route. Nor was any political feeling aroused on the issue of shipping conferences and combines, for the Imperial Government was willing to agree to disapproving of them if they prejudiced trade, and on this

opinion was divided. South Africa held they did, and insisted on penalizing companies giving deferred rebates by denying them mail contracts and charging higher dues; Sir J. Ward admitted that rebates were necessary to secure a regular refrigeration service to the Dominion; Mr. Brodeur complained that an insurance combine penalized Canadian ports for the benefit of United States ports, while Mr. Buxton admitted that there was grave doubt in the United Kingdom of the advisability of putting into effect even the moderate proposals of the recent Royal Commission on Shipping Conferences. The Imperial Government met Australia by agreeing to use its best influence to reduce Suez Canal dues, making it clear that it placed Imperial interests above its profits as shareholder in the Company. Concerted action as to participation in international exhibitions was agreed on. The Australian suggestion of the adoption of the decimal system of coinage, weights, and measures, was regarded with indifference or dislike by the rest of the Conference, and the suggestion of the interchangeability of silver coinage was negatived by the Imperial Government as only possible if the Dominions were content to give up the profits on silver coin. There was agreement on the desirability of uniformity of law as to patents, trade-marks, and companies, and accident compensation was generally approved, but not as regards South Africa; satisfaction was expressed at the outcome of the Copyright Conference of 1910.

(vii) *Legal Questions*. The Dominions consented to the very natural request of the Imperial Government that, when deporting aliens, e.g. from Canada or South Africa, due notice should be given to it, so that it might be able to apply to such aliens the provisions of its Aliens Act, and save itself from being burdened with criminals from the Dominions. The question of alien immigration exclusion was got rid of by referring it to the Royal Commission. A long discussion on the relief of destitute and deserted persons showed the Imperial Government in a condition of unwillingness to take action to secure that men who left their dependents and went to the colonies should be compelled to keep them, while the Dominion Governments were inclined to contemplate deporting such persons.<sup>1</sup> Legis-

<sup>1</sup> *Maintenance Orders (Facilities for Enforcement) Act*, 1920 (10 & 11 Geo. V, c. 33); *Peagram v. Peagram* (1926), 42 T. L. R. 530.

lation for the mutual enforcement of claims for maintenance met the difficulty, but only in 1920. Similarly there was a discussion on a proposal for enforcing arbitration awards, which on the motion of the Imperial Government was transformed into the more useful topic of general enforcement of judgements, resulting likewise in legislation in the *Administration of Justice Act*, 1920.<sup>1</sup> A far-reaching proposal by the Commonwealth Government in favour of the several parts of the Empire punishing conspiracies to defeat the law of other parts led to nothing but a promise by the Imperial Government to consult the Crown Colonies as to how far action could there be taken to meet the wishes of the Commonwealth.

### § 2. *The Imperial War Cabinets of 1917 and 1918*

The stress laid by Mr. Fisher and General Botha on the extent to which the Prime Ministers were taken into the *arcana imperii* at the Conference of 1911 was perhaps exaggerated by these statesmen; the Opposition in the Commonwealth took occasion to remind Mr. Fisher how effectively Sir W. Laurier had declined to accept any obligation or right to share in the conduct of Imperial policy. The war changed the situation; Sir R. Borden and Mr. Hughes were both on visiting England invited to meet the Cabinet and to take counsel with it, and the matter was carried to a logical conclusion when a change of Government took place in 1916, and a telegram of 14 December invited the Prime Ministers of the Dominions to a special War Cabinet to discuss the prosecution of the war, the conditions of peace, and post-war problems.<sup>2</sup> India was asked to send three representatives to act as assessors to the Secretary of State. All the Dominions save Australia were represented, Mr. Hughes being detained by the need of fighting an election, as the Senate declined to pass a resolution asking for the necessary legislation to extend the life of Parliament for a year. On arrival in England meetings were held in two forms. In the first place, the Dominion representatives—not more than two at a time—sat with the British War Cabinet to discuss the method of ending the war, fourteen meetings taking place between

<sup>1</sup> 10 & 11 Geo. V, c. 81; Dicey and Keith, *Conflict of Laws*, Rule 117.

<sup>2</sup> Keith, *War Government of the Dominions*, pp. 27 ff.; *Parl. Pap.*, Cd. 8566, 9005, 9117; Cmd. 325.

20 March and 2 May ; the Colonial Secretary at these meetings represented the Crown Colonies, &c. On the other hand he, and not the Prime Minister, presided at a series of meetings of the Imperial War Conference, which was also distinguished from the Cabinet by its subject matter, less urgent issues and those not directly connected with the war being relegated to it. At the last meeting of the War Cabinet it was agreed that such meetings should be annual or more often if requisite ; and that the Prime Ministers should be members, equally authorized alternates to be supplied by the Dominions if the Prime Ministers were not available, while India was to have a spokesman of her people chosen by the Indian Government. Sir R. Borden, on 3 April, addressing the Empire Parliamentary Association, emphasized the equality of the members of the Cabinet ; the British Prime Minister presided, but only as *primus inter pares* ; each nation preserved unimpaired its perfect autonomy, its self-government, and the responsibility of ministers to its own electorate. At the close of the Cabinet General Smuts was invited to remain in England in an anomalous position ; he did not represent the Union, nor was he an Imperial minister, but he was a sort of adviser to the Imperial Government and the British War Cabinet.

In June 1918 the Imperial War Cabinet reassembled, at the crisis of the fate of the Allies, when the German onslaught had reached the Marne. All the Dominions were represented, and India had, beside the Secretary of State, Mr. Sinha to speak for her people and the Maharajah of Patiala to represent her princes. The British War Cabinet took part in the discussions, and it was stated that the Dominion members took an important share in the deliberations which determined the Imperial attitude at the Versailles session in July of the Allied Supreme War Council, and they were present as guests at a Council meeting on 5 July. Two very interesting resolutions were reached. The Prime Minister admitted the right of the Dominion Prime Ministers to communicate direct with him, they alone to be the arbiters as to what matters were of such importance as to justify this procedure ; telegrams were as a rule to pass through the Secretary of State, but the right was conceded of direct communication even in this manner. Secondly, to secure continuity and regular consultation with the Dominions between

meetings of the Imperial War Cabinet, each Prime Minister was to be at liberty to appoint a representative, either a resident or visiting minister, to sit on the Cabinet in his absence, while India was to be represented. This arrangement was described by Mr. Massey on 7 November to his Parliament as marking a most important constitutional development and foreshadowing the creation of an Imperial Cabinet in a manner preferable to any Imperial Federation, while Sir J. Ward, his colleague at the Cabinet, asserted that it was a step on the way to the Imperial Parliament which he advocated as in 1911. But the plan never became operative; Mr. Hughes had not left England, General Smuts had continued to attend Cabinet meetings, and on 27 October the Dominions had been advised that, in view of the rapid progress of events, the Prime Ministers should hold themselves ready to return. On 20 November new discussions of the Cabinet began, though it was not until 16 December that General Botha came back. On 3 December the Cabinet had an important conference with M. Clemenceau and Marshal Foch for France, Baron Sonnino and Signor Orlando for Italy, and before and after Christmas with President Wilson. During this period the general policy of the British delegation to the Peace Conference was discussed, and, when in January 1919 the Imperial War Conference proceeded to Paris, it turned itself naturally into the British Empire delegation, while arrangements already referred to were made for the distinct as well as collective representation of the Dominions at the Peace Conference. Parallel with the meetings of the Cabinet there were, as in 1917, Conference meetings under the presidency of the Secretary of State.

The Imperial War Cabinet bore a misleading title, and evoked much muddle-headed thinking from the *Round Table* group and public prints such as *The Times*, the usual lack of grasp of essentials being shown by these organs of popular confusion. Sir R. Borden again was used to address the Empire Parliamentary Association on 21 June, when he insisted that the proceedings of 1917 had been revolutionary. The Imperial Government had hitherto been a trustee for the Dominions as regards foreign affairs, and had not always deemed it needful to consult the beneficiaries. All that had changed; the Dominions dealt with foreign affairs on the basis of equality.

Conscious of the absurd misnomer of the term 'Cabinet', for which he was not responsible, he attempted to justify it by the remark that Cabinet had changed its meaning in the course of time and might change it again.

If I should attempt to describe it (he added) I should say it is a Cabinet of Governments.<sup>1</sup> Every Prime Minister who sits around that Board is responsible to his own Parliament and to his own people; the conclusions of the War Cabinet can only be carried out by the Parliaments of the different nations of our Imperial Commonwealth. Thus each Dominion, each nation, retains its perfect autonomy. I venture to believe, and I thus expressed myself last year, that in this may be found the genesis of a development of the constitutional relations of the Empire which will form the basis of its unity in the years to come.

This description is enough to dispose of the absurd view that the Imperial War Cabinet was an Executive for the Empire as the British War Cabinet was for the United Kingdom. The differences between a true Cabinet and this kind of Cabinet were far more important than the similarities. The Imperial Cabinet had no official head: the presidency of Mr. Lloyd George was complimentary. The members sat by virtue of their representation of different parts of the Empire, not by his appointment. There was no collective responsibility: each delegate was responsible only to his own Government and Parliament. There was no possibility of majority decision, no necessity of bowing to the will of the majority or resignation: each Dominion delegation agreed to any resolutions subject to obtaining the concurrence of the Dominion Cabinet and of the Dominion Parliament. In no sense had the Imperial War Cabinet any executive capacity. If any resolution were agreed to, it could be made good, as far as the United Kingdom was concerned, by the immediate action of the Imperial Ministers, for they commanded the Imperial Parliament's confidence, and in the *Defence of the Realm Act* and the willingness of Parliament to pass any legislation asked for they were able to effect their purposes. What, however, made the discussions extremely valuable, and gave reality to the proceedings of the Imperial

<sup>1</sup> Sir R. Borden himself has never suggested any intelligible sense of this *bon mot*. Mr. Bruce in the Commonwealth Parliament (3 Aug. 1926) with marked emphasis treated the War Cabinet as a wholly abnormal development in war times (p. 4774).

War Cabinet, was the fact that the naval and military forces of the Dominions had been handed over to Imperial control, and thus by the Cabinet system the Dominions felt that they had some voice in deciding the use of their forces, so far as the British Government itself possessed control after the creation of a single command on the western front as the outcome of the *débâcle*<sup>1</sup> of March 1918. It is true that in the ultimate issue the wishes of the Dominions could not prevail over those of the Imperial Government, but it is idle to imagine that the views of the Dominions effectively expressed were not of importance in forming British policy. But constitutionally the Imperial War Cabinet differed from the Imperial War Conference merely in its more immediately important sphere of operation and in formal matters such as the presiding officer and greater freedom of composition of the Conference.

### § 3. *The Imperial War Conferences of 1917 and 1918*

The Conference of 1917<sup>2</sup> held its meeting between 21 March and 27 April, and much of its work was secret, dealing with minor points of the prosecution of efforts against the enemy. On the constitutional issue of the reconstruction of the relations of the Dominions and the United Kingdom it felt itself unable to come to decisions, reserving the matter for a special Imperial Conference to be held after the war. But it laid down the view that any readjustment of relations

while thoroughly preserving all existing powers of self-government and complete control of domestic affairs should be based upon a full recognition of the Dominions as autonomous nations of an Imperial Commonwealth, and of India as an important portion of the same, should recognize the right of the Dominions and India to an adequate voice in foreign policy and in foreign relations, and should provide effective arrangements for continuous consultation in all important matters of common Imperial concern, and for such necessary concerted action, founded on consultation, as the several Governments may determine.

The discussion preceding this resolution evoked from General Smuts the extremely sensible remark that, whatever might be

<sup>1</sup> For the errors of Mr. Lloyd George's Government in this regard see Robertson, *Soldiers and Statesmen, 1914-1918* (1926).

<sup>2</sup> *Parl. Pap.*, Cd. 8566.



said or thought, the Dominions were still 'subject provinces of Great Britain. That is the actual theory of the constitution and in many ways which I need not specify to-day<sup>1</sup> that theory still permeates practice to some extent'. He pointed out that the resolution negatived the federal solution; the United States was indeed a success, but it was a compact continent, wholly unlike young nations widely separated in space, of different race, speech, and economic conditions. Sir J. Ward still thought of federation as an ultimate goal, but recognized that the United Kingdom must first be reorganized on a federal basis. More important was the definite recognition that the resolution of the Colonial Conference of 1907, which excluded India from the Conference, should be modified, and it was further agreed that India should have the right to apply to the Dominions measures of immigration restriction similar to those used against her nationals. Uniformity of action as to naturalization was duly approved.

Defence problems evoked a request to the Admiralty to prepare after the war a scheme for the effective naval defence of the Empire. War Office proposals were discussed for uniformity of training, of ordnance personnel, and of equipments and stores, while stress was laid on the development in the Dominions of the power of self-supply in these matters. The proposal for an Imperial War Graves Commission was accepted on the lines of the Prince of Wales' letter of 15 March.

The economic resolutions were dominated by war conditions. It was agreed to seek to make the Empire independent of other countries in respect of food supplies, raw materials and essential industries, and to encourage migration. The creation of an Imperial Mineral Resources Bureau was approved, and the use of Trade Commissioners to push British trade in the Dominions was recommended. Agreements were reached as to patents and trade marks, made specially important by war conditions, and it was agreed to consider after the war the burden of double income tax which war rates had made of grave importance.

The Conference of 1918<sup>2</sup> as in 1917 kept much of its proceedings secret. The issue of correspondence channels was there first discussed, the objections to the Prime Minister dealing

<sup>1</sup> For a list, see Keith, *Imperial Unity and the Dominions*, pp. 589 ff.

<sup>2</sup> *Parl. Pap.*, Cd. 9177.

with all Dominion affairs being emphasized, and the matter was finally referred to the War Cabinet, where it was decided favourably to the right of the Prime Ministers to communicate on matters of Cabinet importance direct. The project of an Imperial Court of Appeal was discussed on a memorandum of Mr. Hughes, which he had prepared for the 1917 Conference, but no effective result was reached. As regards naturalization consideration of the subject by a special conference was approved, but a proposal that subjects of enemy countries should not be allowed to be naturalized for a period of years or to obtain political rights or privileges in respect of lands or mines was not accepted by Canada and was opposed by the Union of South Africa. The principle of reciprocity in immigration restriction between India and the Dominions was reaffirmed in greater detail, stress being also laid on the right of an Indian to introduce one wife and minor children if he were legally domiciled in any Dominion.

The termination of hostilities being in sight, it was agreed that a Military Demobilization Committee should be set up to include Dominion representatives to deal with the complex problem of securing the sending back of the Dominion forces to their homes. The work of the War Graves Commission was extolled and the agreement reached that the cost of its operations should be based on the number of graves.

In the economic sphere efforts were made to come to an agreement regarding the preservation of raw materials for the Empire and their supply on a basis of reciprocity to the Allies, but nothing very much was accomplished. There were discussions on petroleum, dyestuffs, and agreement to keep German influence out of the non-ferrous metal industry on the lines of the British Act of 1918.<sup>1</sup> It was agreed also to proceed with the development of the Mineral Resources Bureau and to set up a Bureau of Mycology to deal with fungoid diseases of plants, thus supplementing the Bureau of Entomology of 1909. Of far-reaching importance was the decision to establish a board to investigate all matters relating to merchant shipping, ocean communications, freights, facilities in harbours, and cognate issues, the body to be composed of Imperial and

<sup>1</sup> This disappeared in 1925 in the United Kingdom under the *Former Enemy Aliens (Disabilities Removal) Act, 1925*.

Dominion representatives and to contain representatives of the different interests concerned. An Imperial news service, shown to be needed by the war, was approved in principle; the cheapening of cable rates commended, an inter-imperial parcel service approved, and also the calling of a Conference to consider uniformity of statistics and the creation of a Statistical Bureau. Immigration into the Dominions from the United Kingdom was pressed for, and the establishment of a consultative committee to keep in touch with the Imperial organization recommended.

The recommendations of the Conference were carried out in many details. The Mineral Resources Bureau was established in 1918 and has turned out large quantities of information, presumably worth printing. A Bureau of Mycology has rendered service, while in 1920 an important Commission for shipping issues was constituted, which since has rendered many reports on questions such as rebates and rates, and has secured substantial advantages for Canada in the reduction of insurance rates. In 1925, however, efforts were made in Canada to secure a control over the freights from Canada by setting up a subsidized service, the Commission being deemed ineffective. But the matter failed to proceed further as Sir W. Petersen, the proposed contractor, died, no doubt in part as a result of the excitement of the struggle at Ottawa over his proposals, which were examined indecisively by a Committee.

More important was the decision in 1919 to accord Imperial preference to the Dominions in the shape of reductions on existing duties, no new duties being imposed for the purpose. Both then and in 1920 the grant was opposed by the Opposition on the score that, save by taxing food and raw materials such as wool, no real concessions could be made to the Dominions. Emigration was also furthered by the creation of the Overseas Settlement Committee on an improved basis to undertake the humbler duties of the Emigrants' Information Office, and the policy of subsidizing emigration was started first for the benefit of ex-soldiers who wished to try their fortune abroad.

A most happy outcome of the Conference was the decision of the Prince of Wales to make himself known in the Dominions. Visits were paid to Canada in 1919, to Australia and New Zealand in 1920, with the most fortunate results in either case.

#### § 4. *The Imperial Conference of 1921*

The War Conference of 1917 had definitely planned that constitutional issues should be decided by a special conference to be called after the war, while under the arrangements of 1918 it was contemplated that meetings of the Imperial War Cabinet could be held during the absence of the Prime Ministers of the Dominions through their representation by some duly authorized substitute. The Imperial Government, it is clear, had no desire to drop this arrangement, but it was found that the Dominions were desirous neither of holding the constitutional Conference, nor of deputing delegates to Cabinet meetings. The truth was that war-weariness and the grave complexities of post-war settlement fully occupied the minds of the peoples of the Empire and deflected interest from constitutional issues of a wider type. The holding of an Imperial Conference in 1921<sup>1</sup> was largely dictated by the pressing issue of the Japanese alliance, which had been renewed in 1911 with the full concurrence of the Dominions, but difficulties as to further renewal arose on various grounds. The coming into being of the League of Nations necessitated the revision of the agreement to accord with the terms of the League, and the question arose whether the notification of the intention to revise, made in July 1920, was equivalent to a denunciation of the agreement in twelve months under its terms. Further, the strong dislike of the United States<sup>2</sup> for the agreement, accentuated by the agitation there over Shantung, and as regards the exclusion of all Japanese immigration, impelled Canada to opposition to a renewal, and Australian opinion was suspicious, while General Smuts, to whose Dominion the Japanese alliance meant nothing, was wholly opposed to any renewal, on the specious ground that the alliance was contrary to the spirit of the League. To clarify the situation the Conference assembled in June 1921 and sat until August. In deference to the protests of those who deprecated the absurd use of 'Cabinet' of such a gathering, the term was dropped, and though, rather ludicrously, no official title was given in the meagre publication of its proceedings, the term 'Imperial Conference' has often been officially and otherwise

<sup>1</sup> *Parl. Pap.*, Cmd. 1474.

<sup>2</sup> *Canadian Annual Review*, 1921, pp. 95 ff.

applied to it. It was in fact a real meeting of the Imperial Conference with full representation of the Dominions and India, where the Maharao of Cutch spoke for the princes, and Mr. S. Sastri for the people, as well as the Secretary of State. The resolutions achieved were of moderate importance.

*(a) Constitutional Questions*

Two quite distinct lines of opinion were manifested at the Conference. Mr. Lloyd George was expansive and genial, but had nothing but goodwill to offer as a contribution towards the solution of the relations of the Empire. Mr. Meighen was convinced that Canada wished no changes, and Mr. Hughes, in an allocution largely addressed to General Smuts, insisted that all was for the best in the best of all possible worlds :

We have been accorded the status of nations. Our progress in material greatness has kept pace with our constitutional development. Let us leave well alone. That is my advice. We have now on the agenda paper matters which mark a new era in Empire government. We, the representatives of the Dominions, are met together to formulate a foreign policy for the Empire. What greater advance is conceivable ? What remains to us ? We are like so many Alexanders. What other worlds have we to conquer ? I do not speak of Utopias nor of shadows but of solid earth. I know of no power that the Prime Minister of Britain has that General Smuts has not.

It is regrettable that the comments of General Smuts on this rhodomontade were not published. Mr. Massey recognized frankly a decline in status since the days of the War Cabinet. Then, he insisted, it was the right of the Dominions with the United Kingdom to represent directly to the sovereign matters in which they had a common interest, but that power was gone, the implication being that the Imperial Government now alone had direct access to the King. There was no doubt some confusion in that. Even the Imperial War Cabinet could not advise the King in the strict sense of the word ; it could resolve on resolutions which the King could be advised by the British War Cabinet to accept for the United Kingdom, but Mr. Massey was never a good constitutional lawyer.<sup>1</sup> He was, however, firm in asserting that he had not the slightest sympathy with

<sup>1</sup> This implies no lack of appreciation of Mr. Massey's many sterling and amiable qualities.

the idea of special treaty powers as being possessed by the Dominions outside the sphere of commercial agreements, and he asserted, as all Prime Ministers before or since, that in time of war the whole Empire was involved. Ultimately the Conference came to a conclusion negating any progress: they held that

(a) Continuous consultation to which the Prime Ministers attach no less importance than the Imperial War Conference of 1917 can only be secured by a substantial improvement in the communications between the component parts of the Empire. Having regard to the constitutional developments since 1917, no advantage is to be gained by holding a constitutional Conference. (b) The Prime Ministers of the United Kingdom and the Dominions and the representatives of India should aim at meeting annually, or at such longer intervals as may prove feasible. (c) The existing practice of direct communication between the Prime Ministers of the United Kingdom and the Dominions, as well as the right of the latter to nominate Cabinet Ministers to represent them in consultation with the Prime Minister of the United Kingdom, are maintained.

It is clear that this was a confession of impotence, and Sir R. Borden<sup>1</sup> justly animadverted on it as a proof of lack of constructive ability.

On the issue of nationality useful progress was achieved, for the Conference agreed to the principle of accepting as natural-born British subjects the descendants of persons living in foreign countries who desired to keep up such nationality by registration at British Consulates, on condition of their renouncing when permitted by the local law any foreign nationality acquired by birth.

(b) *Position of British Indians in the Empire*

Despite the bitter protests of General Smuts, the earnest pleading of Mr. Sastri and the support of the Imperial Government secured the affirmation by the Conference of the doctrine that, while the absolute right of each community to protect itself from immigration was conceded, there was

an incongruity between the position of India as an equal member of the British Empire, and the existence of disabilities upon British Indians lawfully domiciled in some other parts of the Empire. The Conference accordingly is of the opinion that in the interests of the

<sup>1</sup> *Canadian Constitutional Studies*, pp. 113 ff.

solidarity of the British Commonwealth, it is desirable that the rights of such Indians to citizenship should be recognized.

But South Africa dissented, and India viewed with profound regret the South African attitude, hoping, however, by direct negotiation to reach accord.

(c) *Foreign Relations*

The opinion of the Conference as to the Japanese alliance was divided, but it was made clear by the Lord Chancellor and the law officers that the Treaty was still in force, and must, therefore, either be accepted as subsisting or deliberately denounced. In any case, however, it would be necessary to alter it to avoid disagreement with the Covenant. Fortunately, a solution of an impasse was afforded by the invitation of the President of the United States to a Conference on Disarmament at Washington, to be preceded by a discussion between the powers principally interested in the Far East and the Pacific. This was interpreted by the Imperial Government to mean that a policy to replace the Japanese alliance by a wider compact should be designed, and the representatives of the Dominions were associated in an effort to plan out a pact between the United States, the British Empire, and Japan. It was proposed to hold a meeting of diplomats of the three countries in London when the Dominion Ministers could be present, and, failing this, the offer was made to proceed to Washington for such discussions, but the President negatived either suggestion, and much of the work done was rather wasted. It was provisionally agreed that the interests of the Empire at Washington at the Disarmament Conference should be represented by the United Kingdom, but, as has been seen, General Smuts repented of the arrangement and secured the presence of Dominion representatives, the United States Government welcoming their presence on the British delegation, but, quite correctly, insisting that she could not act otherwise than she had done, seeing that with the Imperial Government alone had she any diplomatic relations.

Other issues of foreign policy were also discussed, the Dominion Prime Ministers being invited to meet the Imperial Cabinet to consider these issues. There was as usual a general agreement on foreign policy, which was explained at length, and the procedure represented a reversion to that of the Peace Delegation.

tion at Paris when all decisions were alleged to be taken by the Conference as a whole. Obviously, however, the decision rested with the Imperial Government, which alone was in a position to support by action any policy resolved on, since it only maintained the requisite army, air force, and navy. British policy in Egypt was, inevitably, approved, but the efforts of Mr. Massey failed to put an end to the anarchy of the condominium in the New Hebrides, which reflects discredit on France<sup>1</sup> in even higher degree than on the Empire. The reparations issue was discussed and the proportions of its division were fixed at United Kingdom 86·85, minor Colonies ·80, Canada 4·35, Australia 4·35, New Zealand 1·75, Union of South Africa ·60, Newfoundland ·10, and India 1·20. The League of Nations was defended by Mr. Balfour on 8 July 1921; he pointed to its services in rehabilitating Austria; in securing a just constitution for Danzig; in administering the Saar; in settling the Austro-Polish dispute over the Jewish immigrants into Vienna; in preventing war between Poland and Lithuania over Vilna; and in determining the status of the Aaland Islands. He referred also to the Barcelona Conference on International Transit and the Permanent Court of International Justice as proofs of the value of the League, and the Conference agreed to support it, but without much enthusiasm save from General Smuts.

#### (d) *Imperial Defence*

Many discussions on naval defence revealed only the absolute determination of the Dominions to do nothing excessive in the way of cost. Mr. Hughes, indeed, echoing a foolish observation of Mr. Lloyd George, asserted that the Imperial Government was no longer able to bear the burden of naval defence, and expressed the willingness of Australia to help. But he qualified his views by insisting that there could be no equality of burden per head, and the Imperial Government had a wider area to provide for—a very odd argument—and further that all Dominions must contribute alike:

The Dominions could not exist if it were not for the British Navy. We must not forget this. We are a United Empire or we are nothing. Now who is to say from what quarter danger will come to any of us?

<sup>1</sup> It is amazing that British diplomacy could not save the New Hebrideans despite the colossal sacrifices of the French settlement of its debt (July 1926).



It comes now from the east, and to-morrow from the west. But from whatever quarter it comes we meet it as a united Empire, the whole of our strength is thrown against the danger which threatens us. If some Dominions say, 'We are not in any danger, you are, you pay; we will not, or cannot, contribute towards naval defence', an impossible position is created. I cannot subscribe to such a doctrine. It is incompatible with the circumstances of our relation to Britain and to each other, it menaces our safety and our very existence, it is a negation of our unity.

As Canada, the Union, and Newfoundland had no intention of paying, the result was the following negation :

While recognizing the necessity of co-operating among the various portions of the Empire to provide such naval defence as may prove to be essential for security, and while holding that equality with the naval strength of any other power is a minimum standard for that purpose, this Conference is of opinion that the method and expense of such co-operation are matters for the final determination of the several Parliaments concerned, and that any recommendations thereon should be deferred until after the coming conference on disarmament.

It was, of course, made clear by Mr. Hughes that his idea of contribution was in the shape of a local navy as already determined on, and various more useful talks took place at the Admiralty as regards local naval forces, oil supply, &c. The discussion of military and air matters was equally unproductive of any results, but the views of the General and Air Staffs as to modes of co-operation were once more placed before Ministers.

#### (e) *Empire Settlement and Migration*

The Conference reached on this head important conclusions. The Imperial Government was prepared to find funds to co-operate with the Dominions on a basis of equal expenditure in securing cheaper passages and furthering settlement, and the Dominions concurred in the proposals, urging Imperial legislation at once for this end. The Union explained that it had little opportunity for white labour, and, therefore, could not co-operate on the scale of the other Dominions. Up to April 1922, there had been sent to the Dominions 50,000 settlers, ex-service men and their dependants, at a cost of £2,700,000. The *Empire Settlement Act*, 1922, made provisions for the sum of £3,000,000 to be available annually to meet emigration costs ;

about a third of the amount was to be spent on grants in respect of part cost of passages and advances on this account ; the rest was to be available to meet the cost of clearing land, irrigation, building of roads and railways, the equipment of farms and the training of emigrants ; but the difficulty encountered was that of finding emigrants acceptable to the Dominions, who wished trained farm workers of the highest type, and refused, no doubt wisely, to do anything to help the emigration of unemployed industrial workers, with the result that only a small proportion of the sums provided could be expended.

(f) *Communications and Trade*

The same negative attitude of the Dominions hampered any great progress in the sphere of communications. Air communications left them cold, and not a single offer of sharing in the expense was made by any Dominion. Wireless telegraphy, long delayed, aroused more interest ; the United Kingdom, Australia, South Africa, and India were urged at long last to complete their stations, and Canada and New Zealand to show a helpful attitude, but much time was to pass before anything was to be done, and Australia already asserted her right to go her own way as to mode of construction and operation. The recommendations of the Imperial Shipping Committee as to the limitation of owners' liability in bills of lading were approved,<sup>1</sup> and New Zealand pressed for the creation of a Royal Commission on Shipping with wide powers ; but Canada disagreed, and Australia and the Union required further time for consideration. The investigation of wireless telephony was urged, and the reduction of wireless and cable rates for press messages sympathetically considered. It was agreed to hold a special conference of experts to consider the possibility of creating a patent which would have Imperial validity.<sup>2</sup>

§ 5. *The Imperial Conference of 1923*

It was impossible for the Premiers to meet in 1922 in view of the general elections in Australia and New Zealand, but a meeting was convened in October and November 1923.<sup>3</sup> It

<sup>1</sup> *Parl. Pap.*, Cmd. 1207.

<sup>2</sup> *Report of the British Empire Patent Conference*, 12-23 June 1922.

<sup>3</sup> *Parl. Pap.*, Cmd. 1987, 1988.

expressed deep regret at the disaster which had just befallen Japan and at the death of Mr. Bonar Law, its convener, and piously approved the necessity of publicity, but the accounts of its deliberations were as unsatisfactory as ever, while a candid critic has condemned the degeneration of the meeting into a series of pleasant chats between the Prime Minister and the other representatives. The Irish Free State was represented for the first time, and India sent Sir Tej Bahadur Sapru and the Maharajah of Alwar. Economic questions were handed over to an Economic Conference<sup>1</sup> whose work had more importance and reality.

(a) *Constitutional Questions*

No issue of any constitutional importance was touched on. As in 1921, the Colonial Secretary made a statement regarding the Crown Colonies, Protectorates, and Mandated Territories, which, however, was really otiose, as none of the Dominions had the slightest claim to intervene in these issues. Assurances were given, however, that the cession to Belgium of Ruanda still left a strip of Tanganyika west of Lake Victoria which would be used for the Cape-Cairo railway. Developments in Palestine were also brought before the Conference, but the Prime Ministers very properly refrained from accepting any responsibility, it being obvious that, if they intervened as regards the British mandates, they would be liable to interference as regards their own. The mention of the affairs of the Colonies, &c., was clearly due to the desire to afford opportunity of self-expression to the Colonial Secretary, and this could be<sup>2</sup> avoided by his removal from the Conference under the new scheme of double Secretaryships of State. A somewhat unnecessary discussion took place on the status of the High Commissioners, turning on such trifles as exemption from taxation, customs duties, and precedence

(b) *The Position of British Indians in the Empire*

Lord Peel opened a discussion with the admission that Dominion restrictions on Indians were believed in India—though, absurdly, he did not share the view—to be based on colour feeling, and Sir Tej Bahadur Sapru, supported by the

<sup>1</sup> *Parl. Pap.*, Cmd. 1990, 2009, 2115.

<sup>2</sup> The procedure in 1926 showed that this was not desired.

Maharajah of Alwar, made an effective plea for the carrying out of the resolution of 1921 through the appointment of committees by each Dominion to consider the matters at issue with an Indian governmental committee, while South Africa was asked to permit an Indian national to be stationed in South Africa to act as a mediary in expressing the wishes of Indians there. Australia and New Zealand were frankly generous ; committees were not needed, but only because they fully accepted the duty of carrying out, as far as they were concerned, the resolution of 1921. Mr. Mackenzie King could not face the annoyance which would be caused in British Columbia by giving the Indians the Dominion franchise, and could not welcome a committee, while General Smuts, asserting that the issue was economic—which is clearly not the whole case—would make no concession of any kind. The Imperial Government, which had caused the deepest indignation in India by its determination to uphold racial discrimination in Kenya,<sup>1</sup> refused to reconsider that decision, though it professed willingness to discuss matters with Indian representatives. Naturally, nothing of this served to appease India's feeling of just indignation at the action of the Imperial Government in adopting a colour bar after the invitation addressed by Mr. Churchill to Indians to settle there. With special fatuity the Colonial Secretary claimed that the discussion negatived the idea of racial inferiority, which he himself had just enforced in Kenya.

(c) *Foreign Relations*

Foreign relations were explained by Lord Curzon in his usual magisterial style, his remarks on reparations and the Turkish treaty being published. The work of the League was also explained by Lord Robert Cecil, and the Conference was easily persuaded to homologate British policy, and to urge the acceptance of the proposal of the United States for an investigation of the reparations problem and an impartial estimate of German capacity to pay. The idea of breaking up German unity by any policy of separation was denounced, and the British Government was urged to consider the calling of a conference, should the American proposal fail to bear fruit, as fortunately was not the case. The Turkish settlement was

<sup>1</sup> *Parl. Pap.*, Cmd. 1922 ; MacInnes, *The British Commonwealth*, pp. 131 ff.

welcomed, though the limited extent of that welcome was made very plain a few months later in the Canadian refusal<sup>1</sup> to accept any obligations under it, on the score that Canada had not been allowed the chance of participating in the negotiations. British action in Egypt was accorded the usual approval, and satisfaction expressed at the solution at Washington of the question of rivalry in construction of battleships and of relations with Japan, to which cordial goodwill was expressed. It was agreed also that the desire of the United States for aid in combating the liquor traffic on her coast should be accorded by waiving the right to insist on a three-miles limit. The attitude of the United States towards Mandates of the 'C' class was discussed, and also—quite uselessly—the vexed problem of the New Hebrides. The question of signature and ratification of treaties arising from the signature of the Halibut Fisheries Treaty between Canada and the United States in March was considered, and an agreement, summarized above, arrived at.

(d) *Imperial Defence*

The utterly anaemic character of the proceedings was revealed in the fullest degree in the discussions of defence. Naval, military, and air matters were all fully discussed, but the Conference actually thought it worth while putting on record the platitudes that it was necessary to provide for the defence of the trade of the Empire, and that it was for the Parliaments to decide the nature and extent of any action to be taken by them. Venturing into further detail, it put on record that each portion of the Empire represented at the Conference had primary responsibility for its local defence; that adequate provision was necessary to safeguard the maritime routes of communication of the Empire; that the mobility of fleets should be secured by the provision of naval bases and of facilities for repair and fuel; that equality of naval strength with that of the greatest foreign power was essential as accepted at the Washington Conference; that co-operation of aircraft should be aimed at by a common organization, training, and the use of common manuals, patterns of arms, equipment and stores, save as regards type of aircraft. Note was taken in the light of these principles of the deep interest of the Common-

<sup>1</sup> *Parl. Pap.*, Cmd. 2146.

wealth, New Zealand, and India in the naval base at Singapore as a means of securing the necessary mobility to provide for the security of the trade and territories of the Empire in eastern waters ; the necessity of safe passage through the Mediterranean and the Red Sea ; and the necessity for the maintenance by the United Kingdom of a Home Defence Air Force of sufficient strength to give adequate protection against air attack by the strongest air power within attacking distance. In conclusion the Conference solemnly asserted its interest in the limitation of armaments. The whole scheme was one devised to satisfy the critics of the Imperial Government that they were justified in their plans of extending the Imperial Air Force and in the Singapore dock scheme, and it is clear that Sir W. Laurier would never have consented to commit himself to instructing the Imperial Government as to its local defence. The Conference, it will be seen, did nothing whatever to lighten the burden of Imperial responsibility ; it enunciated the obvious truism that each part of the Empire is responsible for its own local defence, and did not even suggest that any aid whatever was due from them towards the great task of keeping open the sea routes, a task which Canada, the Union, Australia, and New Zealand were perfectly content to leave to the Imperial Government. Under these circumstances, to homologate the principle of equality with the greatest naval power was to impose on the United Kingdom the duty of keeping pace with the United States, an infinitely richer and more populous country than the British Islands. Some trace of feeling of shame at this attitude of pressing on the United Kingdom a burden which the Dominions were not willing to share undoubtedly was felt in New Zealand, where the Government was at least anxious to consider <sup>1</sup> a contribution of £100,000 a year to the cost of the Singapore base, although, of course, that base would not have any justification but for the need of protection of Australia and New Zealand trade and territory.

(e) *Legal Questions*

Two minor legal questions received consideration. The grant of Imperial naturalization to cover persons resident in ' B ' and ' C ' Mandates and in Protectorates was considered and proved,

<sup>1</sup> This project, however, only matured in 1927.

especially in view of the desire of General Smuts to turn the Germans of South-West Africa into British subjects.<sup>1</sup> A minor difficulty was reported by the Commonwealth as to the constitution of the Committees of Inquiry which are required for the revocation of certificates of naturalization, and which must under the Imperial Act be presided over by a person who holds, or has held, high judicial office. The Commonwealth definition of such office had proved inconvenient, and the Conference was willing that the Commonwealth should modify the definition<sup>2</sup> if, after further examination of the practice and of the British usage, it deemed it necessary so to do. As to nationality of married women<sup>3</sup> the Committee merely recommended that a woman whose marriage is for all intents and purposes at an end should be able to obtain readmission to British nationality. Discussion of proposals to secure that legal marriages with foreigners should not be held invalid in their countries by reason of some formality omitted led to the realization that the steps taken to secure observance of the *Marriage with Foreigners Act*, 1906, represented all that could be done.

#### § 6. *The Imperial Economic Conference of 1923*

More serious work was accomplished in the field of economics. The Imperial Government had now taken the initiative in pressing for oversea settlement, and its proposals were duly adopted, though nothing serious came out of them, and on 8 April 1925 the Imperial Government was driven to offering to the Commonwealth a scheme<sup>4</sup> under which £34,000,000 is available for loan to the State Governments at a very low rate of interest in order to promote settlement or public works likely to encourage settlement, on the understanding that, for each

<sup>1</sup> See the memorandum of 23 Oct. 1923, *Parl. Pap.*, Cmd. 2220. Naturalization was duly accorded in 1924 by Act No. 30, but it, of course, had no Imperial validity in the absence of an Act of the Imperial Parliament.

<sup>2</sup> The matter is not dealt with in Act No. 10 of 1925.

<sup>3</sup> See the report of the Joint Committee, *Parl. Pap.*, H. C. 115, 1923. Following on the resolution of the House of Commons, Feb. 1925, a resolution was passed in the Commonwealth House of Representatives, 25 Feb. 1926, in favour of facultative retention of her nationality by a British woman on marriage, but Mr. Bruce made it clear that the nationality of children must follow that of the father; *Parl. Deb.*, 1926, pp. 685 ff., 1138 ff.

<sup>4</sup> *Parl. Pap.*, Cmd. 2640.

£75 advanced, one assisted migrant shall sail direct from the United Kingdom and be satisfactorily settled in a State, involving, if the scheme were fully worked, 450,000 persons being settled in ten years. The success of the agreement rests on the efforts of the States to carry it out ; and the dislike of assisted immigration expressed by Labour in Australia, and resentment at the assurances contained in the agreement that assisted migrants are to be secured work, render the future of the agreement in actual operation extremely dubious. The terms were rejected out and out in New Zealand <sup>1</sup> as quite inadequate, and in it the prior duty of settling New Zealanders was naturally affirmed. But in 1925 success was obtained in the reduction of the sea passage to Canada to £3, the Dominion Government having tardily awakened to the desire to secure population to counteract the melancholy disappearance of her own sons over the border to the more clement and richer land in the south. In South Africa the demand is only for immigrants with large amounts of capital to whom assistance under the Imperial scheme would be absurd.

A further Imperial offer of defraying for five years three-quarters of the interest on loans to public or private public utility undertakings in the Dominions in order to enable them at once to put in hand development works, in so far as expenditure was incurred on orders placed in the United Kingdom, was refused outright by Queensland and was practically a dead letter.

The Imperial Government offered an Imperial preference, in deference to the extremely urgent demands of Messrs. Bruce and Massey—both of whom had evidently forgotten that the trade of their countries existed by virtue of Imperial protection. It embodied the new principle that fresh burdens were to be placed in the shape of taxation on the British working classes and consumers generally in order to give a Dominion preference. The duty on foreign currants was to be increased, 10s. 6d. a cwt. was to be imposed on any other dried fruit which the Dominions might desire to have penalized, and 5s. a cwt. on all preserved fruit except fruit pulp for jam manufacture. A guarantee was offered to maintain  $\frac{1}{2}$ d. per lb. preference on sugar for ten years, and to increase to one quarter the preference on tobacco, while duties on wines were to be altered by increasing to 4s.

<sup>1</sup> Cf. *Parl. Pap.*, Cmd. 2167.



from 2s. the preference on wines between 30° and 40°, and raising from 30 to 50 per cent. the preference on the surtax of 12s. 6d. on sparkling wines. These advantages, however, for the consumer were counteracted by new duties of 5s. a cwt. on raw apples, 10s. a cwt. on foreign canned salmon, lobster, crayfish, and crabs, a like duty on honey, and 6d. a gallon on lime and lemon juices, in all these cases the Empire product entering free. The folly of offering and of accepting these burdens—which would have done hardly any good to the Dominions, save in the minor forms of helping on the dried fruit industry in Australia and Canadian salmon packing—was seen when the Government of Mr. Baldwin was defeated at the election of 1923 fought on the wide issue of protection, to which Mr. Baldwin had moved after his experience at the Conference. The duties were rejected by the Commons in 1924, though as regards those merely giving preference on existing duties—which was the policy of 1919—by a minute majority, and after the fall of the Labour Government Mr. Baldwin's Government in 1925 was compelled to drop all the new duties, and to offer in lieu £1,000,000 to aid in marketing Dominion produce,<sup>1</sup> a step which at once evoked a demand that help should be afforded to marketing British agricultural produce. In 1926 the further step was taken of stabilizing the Dominion preferences for ten years.<sup>2</sup>

There was unanimity in a harmless resolution urging the use of Empire materials and products by all Governments, including those of the States, provinces, and local bodies.

A sensible step was taken in putting at the service of the Dominions both the diplomatic commercial officers and the consular officers abroad for trade purposes, in the same manner as the Imperial Trade Commissioners had been made available for consultation. It was agreed that, where inquiries referred to matters in Europe, they should pass through the Department of Overseas Trade, in other cases they should go direct. The

<sup>1</sup> The Committee with Dominion representatives was duly set up in full operation in 1925.

<sup>2</sup> Such action is, of course, liable to variation by any subsequent Parliament and is constitutionally undesirable on a party vote. Mr. Churchill's tergiversations in pursuit of office were amusingly portrayed in the Commons on 21 July 1926.

Dominions offered to place their Trade Commissioners at the service of other Dominions, and it was arranged that efforts should be made when several parts of the Empire had commercial representation in one place that the offices of the representatives should be in close proximity to facilitate co-operation. The Imperial Government also urged the free admission of commercial travellers' sample and trade catalogues, which some Dominions delight in penalizing, presumably on Sir W. Lyne's thesis that every importer of British or foreign goods is an enemy to the Commonwealth. A colourless recommendation of further attempts to improve statistics was passed. The work of the Imperial Shipping Committee was commended, but no increase in its status or importance was recommended. Nor would the Dominions have anything active to do with the project of airship services temptingly displayed before them. The Conference plaintively urged the Governments of the Empire to make progress with the long-drawn-out issue of wireless telegraphy, and urged the Governments which had successfully insisted on the laying of a new Atlantic Cable to use it and not to send their messages by other routes. It was agreed to summon representatives of the Dominions and India to meetings of the Imperial Communications Committee when matters of concern to them were under debate. It was agreed to urge the further extension of the recognition of judgements and arbitration awards throughout the Empire in accordance with the resolution of the Imperial Conference of 1911, as carried out in the Imperial Act of 1920. The work of the British Empire Patent Conference of 1922 was considered, but the proposal for an Empire patent was vetoed by Canada on the score that there was no provision in the scheme for the Imperial recognition of a Canadian patent, and the Conference merely advised its application to the Crown Colonies and Protectorates, a matter not properly in their sphere. Fear of the reservation of trade in foreign countries to national shipping, evoked a definite statement that the Empire did not contemplate any differential treatment of British and foreign shipping but that, if other countries differentiated, remedial measures would be considered. It was noted with satisfaction that common forms of invoice and certificate for use by exporters had been adopted in Australia, New Zealand, the Union, and

some Colonies, and a more extensive use was urged, and another form of certificate where duty was levied on invoice value was commended for general adoption, as well as a simple certificate in respect of postal packages. The conclusions of the League of Nations International Conference on Customs and other similar Formalities of October 1923 was recommended for adoption. A proposal for Empire currency bills was discussed, but wisely regarded as needless in view of the gradual approach of the currencies to parity and the probably ultimate disappearance naturally of difficulties of exchange, though temporary remedial measures were suggested. A scheme proposed for the future administration of the Imperial Institute and the Imperial Mineral Resources Bureau was approved with modifications and the payments of the Dominions decided upon, ranging from £2,000 for Canada to £200 for the Irish Free State and Newfoundland. It was agreed also that co-operation in technical and scientific research was desirable.

A more novel proposal was approved, the liability of Governments engaging in trade to taxation in respect of trade profits or property by the Legislature of any part of the Empire in which it operated. It was agreed also that the Dominion would support the application of the same principle to foreign Governments within British jurisdiction and vice versa. Approval was also given to the draft agreement to terminate the immunity of State-owned ships<sup>1</sup> which had been arrived at by the International Maritime Committee at Gothenburg in August, under which trading ships, though Governmental, have no privilege, while Governmental ships are made liable to suit in their own Courts only in respect of collision damage, with the exception of acts done in exercise of belligerent rights.

One matter arousing sharp feeling was debated by the Conference. Canada had been definitely promised during the war pressure that her cattle would be admitted alive for store purposes into the United Kingdom, but by an inexcusable piece of bad faith Governmental action to redeem the promise was delayed in order to meet the wishes of British farmers, for whose benefit they had been kept out under a ludicrously false allega-

<sup>1</sup> See Garner, *B. Y. B. I. L.*, 1925, pp. 128 ff.; N. Matsunami, *Immunity of State Ships* (1924); and now the Diplomatic Conference of April 1926 (*L. Q. R.* xlii. 308 ff.); Dicey and Keith, *Conflict of Laws* (ed. 4), p. 208.

tion of danger of disease—the cattle being in point of fact far more healthy than British. It is melancholy to record that the Minister who gave an unqualified pledge in 1917 endeavoured to explain away his words in 1922, but despite the efforts of Mr. A. Chamberlain and Mr. Baldwin, Mr. Lloyd George and Mr. Churchill insisted on keeping faith, when the Dominion Government renewed the matter in 1922, and, reluctantly but decidedly, the House of Commons kept faith by passing an Act<sup>1</sup> to repeal the prohibition of 1896, but only as regards Canada, though obviously there was no justification for differentiating against the other Dominions. The assent of the Government had been reluctant, and efforts were readily made by the new administration to render the concession worthless by straining the terms of the agreement with Canada as to the precautions as to entry to be taken to prevent the invasion of disease. Canada raised the question at the Conference of 1923, and after much hard work succeeded at last in obtaining a reasonable amount of fairness. The episode is a deplorable instance of how little public faith influences public men when material advantage affects them, and fortunately no such serious instance of bad faith by a Dominion is yet on record.

The conclusions of the Empire Forestry Conference (Canada, 1923) were recommended for acceptance.

Examination of workmen's compensation revealed defects. In some cases compensation legally due under local Acts in respect of an accident in that place was refused because of removal to, or residence in, another part of the Empire, and the abolition of this discrimination was urged. It was also recommended that in cases where seamen's compensation was limited to accidents happening in territorial waters the Legislatures should extend the rule to cover all accidents in ships registered in the territorial ambit of their jurisdiction, as no doubt can properly be done under s. 735 of the *Merchant Shipping Act*, 1894, or under the general legislative power by apt words.<sup>2</sup> It was also recommended that in cases where foreign laws discriminated against British subjects, retaliation might be applied by providing that compensation in British territory to aliens

<sup>1</sup> 12 Geo. V, c. 8; *Parl. Pap.*, Cmd. 1722; *Canadian Annual Review*, 1922, pp. 168–72; 1923, pp. 104–7.

<sup>2</sup> Cf. *Workmen's Compensation Board v. C. P. R. Co.*, [1920] A. C. 184.

should depend on reciprocity. It was recognized that from many aspects the matter fell within provincial and State jurisdiction and, therefore, could not be effected by the Dominions of their own powers.

Finally, it was agreed to constitute an Imperial Economic Committee on which the United Kingdom should have 10 members, the Dominions 2 each, the Colonies 2, and India 2, 'to consider and advise upon any matters of an economic or commercial character, not being matters appropriate to be dealt with by the Imperial Shipping Committee, which are referred to it by any of the constituent Governments, provided that no question which has any reference to another part of the Empire may be referred to the Committee without the consent of that part of the Empire'. The resolution was not accepted by Canada, and in 1924 it was rejected by the Labour Government in the United Kingdom. The fall of that Government from power was followed by the decision to act on the resolution, and, as Canada agreed to accept the Committee on the clear understanding of the limited character of its powers, the Committee was duly constituted in 1926.<sup>1</sup> Like the Imperial Shipping Committee it rests on the principle of a purely advisory body dealing with definite references, and claims no executive power.

#### § 7. *Proposals for Conferences in 1924, 1925, and 1926*

The unconstitutional action of the Labour Government in 1924 in recognizing the Russian Government without consultation with the Dominions and its attempt to ignore the rights of the Dominions in respect of the Reparations Conference, a project defeated by the stern remonstrances of the Canadian Prime Minister, resulted in a feeble effort to reopen the question of the Constitutional Conference proposed in 1917 and abandoned in 1921 to the disgust of Sir R. Borden. A telegram of 23 June 1924<sup>2</sup> suggested that as a preliminary to a possible

<sup>1</sup> See the Secretary for the Dominions, House of Commons, 31 March 1926; £500,000 was provided for 1926-7, thereafter £1,000,000. Due regard was to be had to British agriculture, and a member was added for that purpose to the body. The actual administration of the grant was entrusted to an Imperial Economic Commission, acting under the Secretary of State, who was responsible for its action.

<sup>2</sup> *Parl. Pap.*, Cmd. 2301.

Conference a meeting of experts might be held to consider the question of securing more effective exchange of views. Stress was laid on the necessity for rapid action in regard to foreign affairs on the one hand, and on the other to the disadvantages arising from interference with Conference decisions by changes of Government, a fact just illustrated by the necessity of revising the British attitude towards preference as the outcome of the defeat of Mr. Baldwin's Government on the issue of protection. The suggestion was thrown out on this head either that representatives of the Opposition in Dominion Parliaments might take part in Conferences, or that Governments should come to Conferences fortified by the approval of their Parliaments for their policy. It was recognized that the presence of Oppositions might hamper the free communication of matters affecting foreign affairs and defence, while the prior consultation of Parliaments might mean a loss of flexibility and a diminution of the chance of achieving agreement on positive steps of policy. The proposals made did not commend themselves to the Commonwealth Government, which merely suggested changes of a minor character, including the creation of a Foreign Office department in the office of the High Commissioner in order to be in touch with the Foreign Office and keep the Government in closer contact than before with foreign affairs ; the supply of fuller information as to foreign policy ; and the attempt to anticipate developments in foreign affairs so that the Dominions might be more effectively consulted in advance, while as regards matters not connected with foreign policy it was suggested that Mr. Deakin's conception of an Imperial Secretariat should be revived. It was also intimated that in the opinion of the Commonwealth the Imperial Government should pay greater attention to the views of the Dominions, or, put in plainer language, should tax the British consumer in order to give a preference to the Dominions on foodstuffs and raw materials, thus depressing the real wages of the British workman in order to swell still more the much higher remuneration of the Colonial exporter. The Canadian Government rejected the suggestions of the Labour Government, emphasizing that the Imperial Conference was a Conference of responsible Governments, not an Imperial Council determining the policy of the Empire as a whole. The other Dominions contributed nothing positive, but were willing

to have a preliminary Conference, when the fall of the Labour Government terminated the whole scheme, for the new administration was not prepared to endorse the suggestions of its predecessor, and thought that the arrangements of 1923 as to treaty negotiation should be allowed time to show whether in operation that afforded any assistance in solving the problems of the situation.

The Imperial Government, however, very shortly<sup>1</sup> after endeavoured to secure a Conference in March 1925 to consider the Geneva Protocol of 1924 for the pacific settlement of international disputes. The replies of the Dominions were eloquent of the difficulties of effective consultation personally owing to the inconvenience of distance, and eventually the matter had to be adjusted by correspondence, the Dominions one and all demurring to the Protocol. The substance of their views, apart from fear lest their position as to immigration should be weakened, was essentially that the effort to tighten the clauses of the Covenant would tend to lead rather to war than to promote peace, the Irish Free State in special hinting doubt as to the wisdom of seeking to stereotype in any way the peace settlement. It proved naturally equally impossible for the Dominions to take part effectively in the discussion of the Locarno Pact, but it was recognized that this at least must be made a matter of verbal consultation, and by putting great pressure on Canada it was arranged to convene a meeting in October 1926.

In view of the summoning of the Conference the Canadian Parliament was invited by Mr. Mackenzie King on 21 June<sup>2</sup> to express approval of the rules of 1923 as to the negotiation of treaties and their ratification, involving the consultation, representation, and consent of all the parts of the Empire involved, and at the same time to place on record its view that before the Government of Canada advised the ratification of 'any treaty, convention, or agreement involving a military or economic

<sup>1</sup> *Parl. Pap.*, Cmd. 2458; P. J. N. Baker, *The Geneva Protocol* (1925); D. H. Miller, *The Geneva Protocol* (1925); K. Linnebach, *Die Sicherheitsfrage* (1925); G. Glasgow, *From Dawes to Locarno* (1925).

<sup>2</sup> Cf. the debate, 22 March 1926, on Mr. Woodsworth's motion in the Commons that Canada should refuse to accept any responsibility for complications arising from the foreign policy of the United Kingdom.

sanction, the approval of the Parliament of Canada should be secured'. The resolution was advocated by the Prime Minister before a listless House on the score that it would make it clear that at the Conference the Minister could in no wise bind Canada to the policy of Locarno without the deliberate approval of the Dominion Parliament. He took the opportunity of criticizing Mr. Meighen's declaration at Hamilton in November 1925<sup>1</sup> in favour of the consultation of the people at a general election before Canada took any share in a British war, asserting that this apparently meant that the country might be plunged into a 'khaki' election, almost involving civil war, before the view of Parliament had been ascertained, but Mr. Meighen declared that this was a misrepresentation, and insisted that he also held that Parliament must first be consulted before the matter went further. Otherwise Mr. Meighen took no part in the debate, which showed on the whole much unwillingness to be embroiled in European affairs. Mr. Bourassa developed at great length his favourite theme of British domination, but expressed preference for connexion with the Empire to merger in the United States. The resolution was accepted finally without a dissident.<sup>2</sup>

Of greater interest was the discussion in the Commonwealth House of Representatives on 3 and 4 August. Mr. Bruce gave an excellent exposition of the existing condition of Empire development, insisting indeed on the unity of the foreign policy of the Empire, but also on the imperfect state of discussion between the various parts. He indicated a desire to see the Locarno Pact accepted for the Commonwealth, but finally declared that it would be left to the Commonwealth Parliament in any event to decide if such a policy eventually approved itself to the Government. As regards defence, he asserted his approval of the Singapore base, but pointed out that Australia had adopted a programme of cruiser and other construction after the withdrawal in 1924 of that proposal which would render it hard for the Commonwealth to contribute substantially towards the cost, though he might be confronted with a desire for aid from the Commonwealth, seeing that its interests were so vital a factor in the policy. He dissented clearly but courteously from General Hertzog's desire to see an intimation

<sup>1</sup> *Canadian Annual Review*, 1925-6, p. 49.

<sup>2</sup> *Ibid.*, p. 64.



made to foreign powers or the League as to the independence of the Dominions in international law. Mr. Watt more unkindly said that if this proposal were meant as a gesture it would result as a jest ; foreign States would properly persist in treating the Empire as a unit of international law. Mr. Hughes homologated this view, but was decidedly in favour of the acceptance of the Locarno Pact, and he demanded that all parts of the Empire should contribute to defence, Britain, however, at a higher rate ; his remarks as usual were a reproach in veiled form of the attitude of Canada. The Leader of the Opposition asserted that the Labour party wished to leave things as they were ; they did not favour closer connexion with Imperial foreign policy or concern with the affairs of Europe, an attitude which, it was pointed out, had support even in the Governmental press. If there arose an emergency, then Australia must be free to decide her action and doubtless she would be as ready to aid as in 1914 in a just cause. He insisted also that Labour was not in principle inimical to immigration, but it was determined that Australian standards should not be lowered, and it was clear that he did not believe that this ideal was really compatible with any serious increase of the population of the Commonwealth.

The discussions in the Dáil of the Irish Free State on 2 and 3 June exhibited in a clear form the aspirations of the Minister for External Affairs. He insisted that the Free State was an independent sovereign State, though he admitted that it might be well to induce the Imperial Government to notify this fact to those foreign powers which seemed unable to appreciate a fact so obvious in the eyes of the Minister. He instanced as cases of inferiority the position of the Governor-General as an agent of what with pardonable inaccuracy he called the Colonial Office.<sup>1</sup> He cited also the limits on the territorial powers of the Free State which had proved inconvenient in the matter of fishery regulations. Further, he declared that it must be made clear that in all matters affecting the Dominion it was the absolute right of the Dominion to have the last word. His views, therefore, bore a considerable similarity to those of the Prime Minister of the Union of South Africa, whose attitude was

<sup>1</sup> The channel of communication via the Governor-General was a special source of dissatisfaction.

essentially that the Union must be recognized as a sovereign independent State, united to the rest of the Empire merely by the possession of the same sovereign, and that not only must its international position be made clear beyond doubt, but everything surviving from the older status of a dependency must be completely and formally swept away, reservation of Bills, restriction on extraterritorial legislation, supremacy of Imperial legislation, power of the Imperial Parliament to legislate for South Africa, even the appeal to the Privy Council.

### § 8. *The Imperial Conference of 1926*

The Conference met on 19 October, and completed its work on 23 November. The precedent of 1923 of having two distinct Conferences was wisely abandoned, and a useful innovation was made in delegating the detailed consideration of minor issues to sub-committees of experts, whose reports were then adopted in formal sessions of the Conference. The whole of the Dominions<sup>1</sup> were represented by their Prime Ministers, though Mr. Cosgrave took a minor part in the proceedings, the duty of representing Irish interests being shared by Mr. Kevin O'Higgins, Minister of Justice, and Mr. Fitzgerald, Minister of External Affairs, and by the High Commissioner in London. The most important committee appointed was that on Imperial Relations over which Lord Balfour presided. As usual little was given to the public ; the vital speeches on defence and the exposition of Empire policy given by the Secretary of State for Foreign Affairs, as well as Lord Lloyd's explanation of the position in Egypt, were ruled to be too secret for publication, though it is obvious that some less confidential version was urgently necessary for communication to the public of the Dominions. It cannot be denied that, as a result, the Conference attracted in England little interest save in so far as it enabled the country to lavish hospitality on the visiting Prime Ministers. General Hertzog's rather indifferent response to these overtures was commented on with needless asperity, but, with the rest of the Prime Ministers, he succeeded in leaving

<sup>1</sup> The interests of Rhodesia were in the hands of the Secretary of State for the Dominions, who had the aid of the High Commissioner in London. India had, besides the Secretary of State, the Maharajah of Burdwan and the Secretary to Government, Commerce Department. See *Parl. Pap.*, Cmd. 2768.

a favourable impression of his honesty of purpose on the British public. The Conference, of which too much had perhaps been expected, naturally proved unable, in the brief time at its disposal and with the distractions of social engagements and other affairs, to accomplish anything striking, its main value lying as usual in the exchange of views between the statesmen of the Empire.

(a) *Constitutional Questions*

On this issue important results had been expected, and General Hertzog indicated his desires by suggesting as the doctrine which should guide the Conference, 'In principle, unrestrained freedom of action to each individual member of the Commonwealth; in practice, consultation with a view to co-operative action wherever possible'. He insisted that South Africa did not possess an implicit faith in her full and free nationhood, which he desired to see internationally recognized, and he urged that the issue of status should be seriously considered. In remarkable contrast was the attitude of Mr. Monroe for Newfoundland; he insisted that Newfoundland was perfectly satisfied with its present status, did not even ask to be consulted on foreign policy, and felt assured that, if a war arose, it would come in convinced that it was fighting in a just cause. Mr. Cosgrave was guarded in expression and the representatives of the other Dominions did not press the question. The result accordingly was that the Conference, on the advice of the Committee on Inter-Imperial Relations, laid down two principles, in themselves unexceptionable, but decidedly vague. The position of the group of self-governing communities composed of Great Britain<sup>1</sup> and the Dominions was defined as follows: 'They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations'. The definition may be admired for its intention rather than for its accuracy as a description of fact as opposed to ideal, and the Conference clearly recognized this fact by the important qualification that

<sup>1</sup> The insistence on ignoring Northern Ireland is due to desire to gratify the Irish Free State. It is rather stupid. See now 17 Geo. V, c. 4, s. 2.

‘ the principles of equality and similarity appropriate to status do not universally extend to function ’. Questions of diplomacy and defence required, it was admitted, a flexible machinery, but in attempting to deal further with the issue the Conference could clearly make little progress.

The royal title caused least trouble ; with the King’s permission it was agreed to change the style from ‘ United Kingdom of Great Britain and Ireland ’ to run ‘ Great Britain and Ireland ’, an alteration which could be resented by none save convinced Republicans, and even they might be consoled by the disappearance of the term United Kingdom. Not unnaturally Northern Ireland protested on 23 November vehemently against the change as hostile to her interests, and the Home Secretary had on 24 November to give full assurances that the style had merely geographical significance.

Much more important was the issue as to the position of the Governor-General. Lord Byng’s action had rendered it inevitable that the delusion that an outsider is necessary to secure the proper administration of Dominion affairs should disappear, and it was accordingly agreed that it was

an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor-General of a Dominion is the representative of the Crown holding in all essential respects the same position in relation to the administration of public affairs in a Dominion as is held by His Majesty the King in Great Britain, and that he is not <sup>1</sup> the representative or agent of His Majesty’s Government in Great Britain or of any department of that Government.

More dubious is the conclusion drawn that the altered status of the Governors-General (including, of course, the Governor of Newfoundland) <sup>2</sup> would render them unsuitable as the channel of communication between the Imperial and Dominion Governments. Fortunately this matter was left to be adjusted with the Governments according to their preferences. It is, of course, already the case that the Prime Ministers can correspond direct on all matters which they deem of sufficient importance, and it would make no great difference if the

<sup>1</sup> Of course as long as the Acts stand unaltered, he must act as an agent as to reservation of Bills, &c. But phraseology must not be criticized too severely.

<sup>2</sup> Essentially not the Governors of the States, Southern Rhodesia, or Malta.

Minister for External Affairs or Prime Minister of each Dominion corresponded direct with the Secretary of State for the Dominions or Foreign Secretary on all other matters, as may be preferred in the case of Ireland. As it is proposed that the Governor-General should be supplied with copies of all documents of importance and be kept as fully informed as to Cabinet decisions and public business as is the King in the United Kingdom—a thing which at present is certainly not the case in Dominion usage—it would *prima facie* seem that the innovation of superseding the Governor-General has not much point or utility. What, it may be asked, is the use of having a Governor-General who is fully informed of all matters and a British representative—whether styled High Commissioner or otherwise—who represents British views and reports Dominion views? The answer in theory is clear enough. The two cases should be quite distinct. The Governor-General should be essentially a piece of the local machinery, who is not constitutionally in a position to report on the views of his Ministers to the Imperial Government, and who in consequence may properly be fully aware of their actions and plans. On the other hand, reports to the British Government should emanate from an officer who is not concerned with the internal government of the country, but merely with its views on external matters, and who should serve, like an Ambassador in a foreign country, as a means of keeping the two countries concerned in close personal touch. He would thus form a counterpart to the Dominion High Commissioner in London, but his existence would place the Imperial and the Dominion Governments on the proper footing of equality. Clearly this is a satisfactory theory of the position, but clearly also with the reduction of his functions to those of a mere head of the local Government, there would be little attraction for a man of political merit or outstanding character in the United Kingdom to seek to be Governor-General, and the last might therefore properly be conferred on a local nominee such as Sir R. Borden in Canada. In most of the Dominions it may fairly be said that the time is hardly ripe for the appointment of British High Commissioners, and it may well be that the Governor-General may still be held to serve as a useful channel of communication. It may be added that Mr. Baldwin on 25 November had to assure the

House of Commons that the position of the Governor-General as to reservation of Bills had not been dealt with at the Conference and his Imperial functions in this regard would not be affected. This negates, of course, his complete supersession in any case as a channel of correspondence.

The vital issue of the legislative powers of the Dominions was considered, but the need of further expert consideration was agreed to. The points discussed were those noted as vital by the writer in 1915,<sup>1</sup> but they are matters on which scant thought appears to have been devoted in the Dominions or the United Kingdom, though General Smuts clearly envisaged them in 1921 when he was overborne by Mr. Hughes. The Irish Free State, however, forced the pace by demanding an exposition of the real position of Canada *vis-à-vis* the United Kingdom, since it dominated her own. Finally it was agreed to refer to a Committee of Experts the issues of the power of the Imperial Government to secure through the operation of reservation that Dominion efforts to legislate should either be defeated or delayed; the questions of the existing extent of the extra-territorial authority of the Parliaments of the Dominions, and 'the practicability and most convenient method of giving effect to the principle that each Dominion Parliament should have power to give extraterritorial operation to its legislation in all cases where such operation is ancillary to provisions for the peace, order, and good government of the Dominions'; and the principle underlying the *Colonial Laws Validity Act*, 1865, and the extent to which any provisions of that Act ought to be repealed, amended, or modified in the light of existing Imperial relations. It is noteworthy that, despite the assertions of equality, the power of extraterritorial legislation for the Dominions is regarded as necessarily restricted to an ancillary power, and that this contrasts entirely with the Imperial power, which is entirely a matter for the Imperial Parliament to decide and cannot be questioned in any British Court. Under the proposed formula the Courts of the Dominions will be compelled to consider the objection to any legislation that it is not really

<sup>1</sup> *Imperial Unity*, pp. 589 ff. Gen. Smuts clearly accepted the views therein laid down (see, e. g., *J. P. E.*, iv. 598), and they are also freely adopted by Sir R. Borden in his *Canadian Constitutional Studies* (1921). But neither did anything effective while in office to carry them out.

ancillary, and in particular clearly legislation for British Dominion citizens in places like Persia could not be deemed to be ancillary to the peace, order, or good government of the Dominion.

Merchant shipping as a peculiarly important case of Imperial control, both by reservation or the insertion of suspending clauses in Acts and the paramount power of Imperial legislation, received careful consideration. Due attention was drawn to the question of registration of British shipping, its relation to status in time of war, the work done abroad by British consular officers for merchant shipping under the Imperial Act, which might not be possible if these Acts ceased to have general validity, and the control exercised by Naval Courts in foreign waters. Just stress was also laid on the very important question of uniformity. On the other hand it was admitted that the narrow restrictions of ss. 735 and 736 of the *Merchant Shipping Act*, 1894, pressed heavily on the Dominions and were out of harmony with the new status of the Dominions, and in the result it was decided to refer to a Sub-Conference, as on other occasions, the issue of the principles which should govern merchant shipping in the Empire, having regard to the constitutional changes which had taken place since the *Merchant Shipping Act*, 1894, and the earlier Acts on which it was based, became law. India was granted special representation on this Sub-Conference, whereas inevitably she was not to be represented on the Expert Committee.

In addition to referring these issues to a Committee and a Sub-Conference the Conference agreed to place two opinions on record. One of them was the commonplace that 'the constitutional practice is that legislation by the Parliament at Westminster applying to a Dominion would only be passed with the consent of the Dominion concerned'. The other recorded that apart from provisions embodied in constitutions or in specific statutes expressly providing for reservation, it is recognized that it is the right of the Government of each Dominion to advise the Crown in all matters relating to its own affairs. Consequently, it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in Great Britain<sup>1</sup> in

<sup>1</sup> This neologism for Imperial Government is cumbersome and need not be adopted outside official circles. See p. 1224, n. 1, and Preface.

any matter appertaining to the affairs of a Dominion against the views of the Government of that Dominion. The appropriate procedure with regard to projected legislation in one of the self-governing parts of the Empire which may affect the interests of other self-governing parts is previous consultation between His Majesty's ministers in the several parts concerned.

These declarations, which have been hailed as of importance, seem neither novel nor important. The second is open to the charge of obscurity, for the opening words are all-important. If they are, as is necessary, taken strictly, then it appears that the resolution merely applies to cases where reservation is not required under the Constitution (e. g. a Secession Bill), or some Act, e. g. the *Colonial Courts of Admiralty Act*, 1890, or perhaps the *Merchant Shipping Act*, 1894. These are cases, therefore, in which reservation is now in any case practically obsolete. In other cases the old procedure seems to be left untouched, and no constitutional principle whatever is enunciated, and, of course, the cases excepted are precisely those in which there is real risk of the Imperial Government having to tender advice to the Crown against the wishes of a Dominion Government. It may be noted that the resolution does not attempt to deny the right and duty of the Imperial Government to advise the Crown even in matters on which the views of the Dominion Government must prevail. The resolution does not seek to negate advice ; it denies only in a certain class of cases the right in constitutional usage to advise the Crown contrary to the wishes of the Dominion Government.<sup>1</sup>

The need for caution in regard to these matters and the kindred question of appeals to the Privy Council was inevitably strongly present to the Dominion of Canada, for the supremacy of the Constitution embodied in the *British North America Act* rests on the continued validity of the *Colonial Laws Validity Act*, 1865, and any tampering with the appeal to the Privy Council in favour of the Irish Free State would arouse fear in Quebec lest her security of judicial interpretation by the Privy Council be in jeopardy.

It is important to note that the whole of these questions was discussed without reference to the position of the States of

<sup>1</sup> It ignores the case of honours ; yet no one imagines Dominion wishes can settle these definitively.



Australia or of Malta or Southern Rhodesia. It is curious that the findings of the Conference appear to have raised difficulties in the States as to what the position of their Governors would be.<sup>1</sup> If they were to be merely parts of the local machinery, the claim for their abolition or at least for local appointments would be strengthened. Or it might be arranged to induce the Governor-General to act as head of the States, delegating his functions to deputies, or the Chief Justices might act. These speculations were clearly wholly premature. Nothing as regards the States could be done unless they themselves took in agreement the initiative, and then only after full consultation with the Commonwealth. The position of a Dominion and of a State differs vitally, and it is clear from the recent declaration of the Government of Victoria<sup>2</sup> that it did not desire that the position of the Governor should be rendered similar to that of the Crown in the United Kingdom. Still less, of course, could the case of Southern Rhodesia be regarded as parallel. In the case of Northern Ireland, on the other hand, there is no reason to imagine that the head of the Government has ever been supposed to act in any way otherwise than the Crown in the United Kingdom.

The issue of the appeal to the Privy Council was discussed,<sup>3</sup> but the Irish Free State received scant support in its desire to secure abolition. There was the usual, it must be feared insincere, declaration that His Majesty's Government did not desire that appeals should lie save in accordance with the wishes of each part of the Empire, but the effect of this was at once nullified by the insistence that a change affecting one part should not take place without full consideration of the effect generally, or in plain words that if Canada did not desire to change—and in face of Quebec this must be Mr. King's attitude—nothing had better be done. The Free State reserved the right to raise the issue again at the next Conference; it is true that in all ordinary cases it can nullify the right, but in constitutional

<sup>1</sup> The Premier of Victoria on 24 Nov. thought it necessary to declare that no Conference resolution could affect the right of the States to correspond through their Governors, as if it were possible that such a result could be contemplated; cf. Keith, *Glasgow Herald*, 27 Nov. 1926.

<sup>2</sup> *Parl. Pap.*, Cmd. 2883, pp. 17–19 (10 Nov. 1925).

<sup>3</sup> See Part VI, chap. iii.

issues this is impossible, and the Free State naturally resents its inability to do what the Commonwealth has so long and well from its own point of view performed.<sup>1</sup>

(b) *India*

India fared badly in the constitutional discussion, which in fact inconveniently raised the difficulty that India is only admitted to the Imperial Conference in virtue of her economic importance and in anticipation of her future status of self-government. The difficulty was evaded by insisting, on the one hand, that the status of India was determined for the time being by the *Government of India Act*, 1919, and on the other by reaffirming the principle of Resolution IX of the Imperial War Conference of 1917 which insisted on the importance of India's position in the Empire. Allusion was made by the Maharajah of Burdwan to the issue between the Union and India, but the Conference was only too happy to be freed from the necessity of any discussion by reason of the arrangement for a free debate in December 1926 as to the issues between representatives of the two Governments concerned. India thus remained excluded from the constitutional discussions of the Expert Committees, but her interests in the matter of merchant shipping were recognized and respected.

(c) *Foreign Relations*

The exposition of the present state of British foreign policy elicited the usual appreciation by the Dominion representatives, but no serious progress could be made towards a settlement of the fundamental problem of improving means of co-operation on vital issues.<sup>2</sup> A partial success was achieved in negating any formal declaration of the independence of the Dominions *vis-à-vis* the United Kingdom, and in exacting a pledge that no part of the Empire would, without further discussion, accept the compulsory clause of the Convention as to the Permanent Court of International Justice, while the attitude of the League powers to the United States reservations as to the conditions on which

<sup>1</sup> See Part IV, chap. ii. Criminal appeals in Canada will perhaps disappear by Imperial legislation. Mr. Baldwin on 25 Nov. declined to promise to consult Parliament before changes not requiring Imperial legislation were made. Such are possible only in Australia and the Union.

<sup>2</sup> See Part V, chap. v, § 9.

it would accept the jurisdiction of the Court was approved. But responsibility under the Locarno Pact was declined, and a complex system of improvements on the mode of negotiating treaties involved no fundamental alteration of interest save in so far as inferentially it negated the Irish or Union of South Africa claim that inter-imperial relations were truly international or fell under the sphere of the League of Nations.

(d) *Autonomy, not Independence*

That the results of the Conference in the field of constitutional and international issues were obscure is sufficiently attested by the curious divergence of foreign opinion and the misconceptions of the press.<sup>1</sup> The issues were well defined by the utterances of General Smuts and General Hertzog. The former asserted that nothing in principle had been altered, the latter that he was fully satisfied with what he had accomplished. But the true conclusion was unquestionably drawn by General Smuts when he asked his rival point-blank whether he was going to adopt the logical outcome of his action in accepting the Conference resolutions, and to withdraw wholly the demand for the independence of the Union. In fact there can be no doubt that the truth lies more nearly with General Smuts than with General Hertzog. The decisions taken, though they were distinctly in favour of autonomy, negated independence.

To accomplish the desires of General Hertzog it was necessary that the Conference should have asserted simply that in no respect, internal or external, was the Union subject to Imperial control. This should have been followed up by a formal declaration *urbi et orbi*, as is the case of the recognition of the independence of Egypt,<sup>2</sup> of the independence of the Dominions. Nothing of the kind took place. The Conference declined to assent to the idea that the *Colonial Laws Validity Act*, 1865, should be repealed, which would have left the way open to secession of the Union from the Empire, and it merely referred it to an expert Committee. It refused even to accord freedom from the shackles of the *Merchant Shipping Act*, 1894, which incidentally precludes the Union from adopting a naval flag without Imperial assent. It raised difficulties even as to extend-

<sup>1</sup> See, e. g., *The Times*, 22 Nov. 1926.

<sup>2</sup> See *Parl. Pap.*, Cmd. 1617 (1922).

ing the territorial limits of Dominion legislation, which, of course, would immediately and automatically be extended by a declaration of independence. It was prepared to admit that the Governor-General should not be in general the agent of the Imperial Government, but it did not even agree to remove all the clauses as to reservation in Acts which impose on the Governor-General duties which nothing short of Imperial legislation <sup>1</sup> can remove. The appeal to the Privy Council was untouched, and, as we have seen, the Conference did not commit itself to any declaration which would deny the right of the Imperial Government to withhold assent from an Act of the Union Parliament providing for secession, and on 25 November Mr. Baldwin expressly negatived any change in the Governor-General's duty as to reservation of Bills. In view of these facts even autonomy is perhaps an exaggerated expression ; independence is absurd. That more may later be conceded is possible, but the only issue at present is what was done.

In international affairs independence was utterly refused. The attempt of the Irish Free State to give an international character to inter-imperial treaties was summarily rejected, and the Free State had to acquiesce in the rejection. No power of the Dominions to make treaties without the intervention of the Crown was conceded, and no alteration was made in the rules that (i) no diplomatist can be accredited to any foreign power save by the King acting on the advice of the Imperial Government ; (ii) no treaty can be made save under full powers issued on that advice ; (iii) no treaty can be made save after the fullest consultation of the Imperial Government ; and (iv) no treaty can be ratified save on that advice. It may be granted that by constitutional usage the Imperial Government normally will act on Dominion advice, but that was conceded in 1923, and had virtually been already granted in 1919, and as regards commercial issues in 1895. It is rather more clearly recognized <sup>2</sup> that the United Kingdom ought not constitutionally

<sup>1</sup> In the Commonwealth change might be made by a constitutional alteration with a referendum as regards the restriction in the Constitution on legislation abolishing the appeal to the Privy Council and the general power to reserve, but this would not affect the *Colonial Courts of Admiralty Act* and the *Merchant Shipping Act*.

<sup>2</sup> No proposal to enact the principle by legislation appears.

to make any treaty binding the Dominions without their assent, but this is given no international sanction or recognition, and it remains with the Imperial Government to complete a treaty binding a Dominion if no early protest is received from the Dominion, and to reply to any protest later made that the Dominion is itself to blame for lack of promptitude in action. The value of the treaty will not be impaired. That positive assent must be obtained if active obligations are to be imposed has always been recognized as regards the great Dominions, and if it were ever in dispute after the Anglo-French Convention of 1919, all doubt vanished during the discussions as to the Lausanne Treaty. Nothing whatever was agreed to to secure diplomatic representation of any foreign country, save the United States, in the Dominions.

The Conference, therefore, may suggest further development, but its achievement was in the main that of negating the claim of the Union and of the Irish Free State that they were or should be independent States of public international law. The Dominions may attain independence, but that will not be until they appoint their own heads of the State, and until these heads can accredit and receive diplomatic agents and make treaties, declare war and peace, all in complete independence of the British Government.<sup>1</sup> Whether or not they recognized the same King nominally would then be a matter of complete indifference, and of minimal value. But it is hardly likely that States which desired real independence would trouble with the maintenance, as an ideal fiction, of a sovereignty which had ceased to be, what it now is, a true symbol of a very real and effective unity. It is characteristic that the group of supporters of Canadian independence who once planned a Kingdom of Canada has advanced to the logical conclusion of a Canadian Republic, and such Australian and South African opinion as desires independence holds strongly the same view. Nor, it need hardly be added, would the people of the Irish Free State,

<sup>1</sup> Cf. Rolin, *Revue de Droit International*, 1923, p. 226. Prof. Allin (*Michigan Law Rev.*, xxiv. 276) admits the limited international capacity of Canada, but insists that it is a preliminary inevitably leading to complete independence. I venture the prophecy that that eventuality will not become real in my time, for the rest *videant alii*. Contrast Mr. Mackenzie King, 26 Nov. 1926, who insists on autonomy in unity as vital.

if they determined on independence, wish to conduct it under the nominal sovereignty of a British King.

One point, however, is certainly worth notice, the suggestion for which Canada is in the main responsible, that by a change in the position of the Governor-General and by the appointment, if desired, of a British representative in the Dominion, the relations of the United Kingdom and the Dominions should be placed on a closer footing of equality, and in a sense assimilated in some degree to that of foreign countries. But no suggestion was made by Mr. Mackenzie King that the relations of the United Kingdom and the Dominions should form the subject of regulation by treaty, and it is indeed plain that, however difficult it may be at times to render precise the constitutional relations of the Empire, it would be infinitely harder to draft treaties which would be satisfactory to any party. For the present, therefore, Canada, whose opinion after all dominates the situation when it has the clear support of the Commonwealth, stands for autonomy without breach of Empire unity, as against any autonomy which must take the form of independence. How long the condition of affairs now existing can stand the test of experience, it is wholly unwise to say. Almost all depends on the goodwill with which the scheme is worked, and it would indeed be fortunate for the Empire if the Nationalist organs in South Africa which acclaimed General Hertzog's success had really accepted the doctrine which he clearly homologated at the Conference. The desire of independence,<sup>1</sup> however, is too deeply ingrained in the mind of a large section of the Dutch of South Africa to render it possible to believe that the Conference of 1926 has settled the issue; it is significant that it was claimed to have rendered the Union Jack out of date.

(e) *British Nationality*

The question of British nationality immediately provoked the issue of legislative authority, for, as pointed out, there exists already the gravest doubt as to the power of the Do-

<sup>1</sup> It is perfectly clear that the Dominions are in theory less autonomous than the South African Republic under the Convention of 1884 as a matter of constitutional law, and less independent as a matter of international law. But they in fact have the compensation of sharing in a fuller international life as members of an Empire, and avoid the risks of external pressure which overthrew the Republic.

minions to override the declaration as to the nationality of married women contained in the Imperial Act of 1914. The Conference, therefore, refrained from deciding this point, in order that it might be dealt with in the light of the discussion of the question of the *Colonial Laws Validity Act*. There was, in fact, a considerable difference of opinion whether it was wise to provide that a British subject on marriage should not become an alien, but should merely be entitled to make a declaration of alienage, and attention was drawn to the activities of the League of Nations in promoting an investigation of the issue of double nationality and no nationality. The matter was therefore left to be disposed of after the constitutional issue had been removed from the way.

Minor changes, however, were agreed to. The proposals of 1923 were reaffirmed,<sup>1</sup> together with provision for facilitating by means of registration of birth the acquisition of British nationality by children of the third generation born abroad of British parents between 4 August 1914 and 4 August 1922 ; for extending the time for the registration of births of children of the second generation born abroad of British parents ;<sup>2</sup> for removing doubts as to the meaning of s. 12 (1) of the Act of 1914 ;<sup>3</sup> for requiring a naturalized alien resident abroad to register annually at a British consulate ; and for authorizing the revocation of certificates of naturalization granted or deemed to be granted in the case of the widow of a deceased naturalized British subject, any person becoming a British subject through his father's or mother's naturalization, and any naturalized person who for two years, being resident abroad, fails to register at a consulate. None of these changes can be regarded as other than innocuous.

#### (f) *Imperial Defence*

The subject of defence inevitably involved meetings between the representatives of the Dominions and the Admiralty, War Office, and Air Office, while a more general discussion took

<sup>1</sup> They include Imperial effect of the naturalization of inhabitants of mandated territories, e. g. South-West Africa.

<sup>2</sup> For the clauses rendering necessary such legislation see Dicey and Keith, *Conflict of Laws* (ed. 4), pp. 166 ff.

<sup>3</sup> This deals with the loss of British nationality by minors through change of a parent's nationality (*ibid.*, p. 193).

place at the Committee of Imperial Defence, to supplement the formal treatment at the Conference itself. No substantial results could be or were achieved, beyond giving the Dominion representatives the opportunity of acquiring first-hand knowledge of the progress made recently by the United Kingdom in perfecting her armed resources and in preparing for war, her power being vividly presented to the visitors by a review of the Fleet and by air exercises. The colourless but sensible resolutions of 1923, were reaffirmed, and a natural regret was expressed that it had not proved possible to make greater progress with the international reduction and limitation of arms therein referred to. The Conference affirmed the obvious principle that it sympathized with reduction and limitation, adding the vital qualification that any action taken must be compatible with the integrity and security of all parts of the Empire and of communications. It noted, however, that, even if reduction and limitation were carried out, a serious effort would be requisite to maintain the standard of strength contemplated in the Washington Treaty, namely equality of strength with any foreign naval power. The Admiralty presented formidable figures of the cost of replacement of obsolete battleships, but the Dominions were, inevitably, not moved to contribute. The representatives of Australia, New Zealand, and India noted with satisfaction the steps taken by the British Government to develop the naval base at Singapore 'in view of the vital importance of ensuring the security of the world-wide trade routes upon which the safety and welfare of all parts of the Empire depended'. The insertion of the term 'all' was doubtless a hint to Canada by the Commonwealth—in pursuance of the urgent advice given by Mr. Hughes to insist that all parts of the Empire should co-operate in naval defence on a basis of equality—that Canada also profited by the expense. Gratification was expressed at the progress made in organizing military formation in general on similar lines, in the adoption of similar patterns of weapons, and in the interchange of officers, and an invitation was extended to the Governments to extend the forms of co-operation and to encourage discussion on defence matters between the respective General Staffs. The recommendation is significant of the very inadequate progress which has been made in effective carrying out of the theoretically



admirable scheme of a true Imperial General Staff. Progress in establishment of air forces was noted, and stress laid on the importance of the provision of air bases, of means of refuelling, and the interchange of liaison officers, and, if possible, of air units. The value of the Imperial Defence College recently established at London as a means of training officers in the problems of Empire defence was impressed on the Dominion Governments, it may be hoped, not without some result. The burden borne in defence matters by India and the valuable decision to constitute a Royal Indian Navy were noted.

Nothing, however, proves more signally the unwillingness of the Dominions to commit themselves in defence matters than the necessity which the Conference felt of recalling the resolutions of a meeting of the Committee of Imperial Defence, which formed part of the proceedings of the Imperial Conference of 1911, in favour of the invitation of representatives of the Dominions to take part in meetings of that Committee when matters affecting the oversea Dominions were under consideration, and of the establishment of Defence Committees in each Dominion. It was agreed that the resolution should be understood as including matters of air defence as well as military and naval matters, to which naturally in 1911 it was confined. But it may be noted that no assent to the resolutions was given by the Dominions, which reserved consideration of the issues. The net progress at the Conference may, therefore, in regard to defence matters be treated as nil.

#### § 9. *Economic Questions at the Imperial Conference of 1926*

The most important result perhaps of the economic discussions was a negative one. Mr. Bruce, who had been assailed with some vehemence as endeavouring to intervene in British politics and to force preference on the electorate in 1923, took, very wisely, the opportunity both at the Conference and outside to place himself in the right by insisting that he merely urged the case of a preference from the point of view of the Dominions, and had no desire to appear as a partisan in English politics. The question of preference naturally was left much as in 1923, with the important exception that it was frankly recognized that the Imperial Government was under pledges to the electorate which precluded the possibility of any imposition of food

taxes, such as alone would appeal strongly to Canada or Australia. Stress was laid on the advisory work of the Imperial Economic Committee as constituted on a restricted basis in accordance with the views of Canada, and on the grant of £1,000,000 annually for the Empire Marketing Board, which was under Imperial control, and had with Dominion assent been extended in function to include the marketing of home produce, it being obviously absurd to spend Imperial funds in advertising Irish Free State produce while denying similar treatment to that of Great Britain or Northern Ireland. A keen sense was displayed on all hands of the real value of inter-imperial trade, in view of the difficulties in regard to foreign markets, though Mr. Coates was careful to insist that it would be absurd to ignore the necessity of making use of foreign exports and foreign demands for Dominion produce. He brought out also the fact that even in New Zealand, through lack of thought, there was an unnecessary loss of opportunities of using British goods, which should be remedied by education, as, in the United Kingdom, Empire shopping weeks and other propaganda served to promote Empire purchases. Stress was laid also on the valuable research work which it was being arranged to carry out in order to further inter-imperial trade, e. g. in matters of cold storage.

On the vital issue of emigration scant progress could be made. It was recognized <sup>1</sup> that mass settlement of any kind was forbidden by economic, social, and political reasons, and that all that could be hoped for was steady progress on sound conservative lines under which increasing care should be taken to secure that emigrants should, if possible, have some training either before departure or after arrival, and that all reasonable aid should be afforded to them in the difficult work of starting life in a new land. Stress was laid on the value of family settlement as well as of group settlement schemes. But it was manifest that nothing of great importance could result from existing machinery in the way either of relieving British unemployment or increasing the dangerously small population of Australia or New Zealand.

The resolutions of the Conference on economic matters were

<sup>1</sup> Cf. the Report of the Overseas Settlement Committee for 1926 (Cmd. 2847) and Lord Clarendon's report on his Canadian tour (Nov. 1926), Cmd. 2760.

not of an important type. The Imperial Shipping Committee found its work commended and agreement reached that it was desirable to continue its existence on the status quo, under which it owes its authority and its responsibility to the Governments which take part in the Imperial Conference. The final act of the Washington Conference of 1926 on the subject of the pollution of waters by oil was considered, and it was agreed to recommend the draft convention then arrived at for the consideration of the Governments of the Empire.<sup>1</sup> The issue of bills of lading was also dealt with. Stress was laid on the wide acceptance, outside Scandinavia, of the Bills of Lading Convention of October 1923, to which effect was given in the United Kingdom and Northern Ireland by the *Carriage of Goods by Sea Act*, 1924, and also adopted by the Commonwealth of Australia, India, and a number of colonies and protectorates, and the Conference noted with satisfaction the fact that adoption of similar legislation was under consideration in the other Dominions, and was likely to be passed in those foreign countries which had accepted the Convention.<sup>2</sup> More complex was the question of the draft conventions on limitation of shipowners' liability and on maritime liens and mortgages, which had not been made the subject of British legislation. It was pointed out that the proposals as to limitation of liability were on the whole advantageous to claimants in respect of loss of life or injury to passengers, and would result in greater satisfaction being obtainable from foreign owners in certain cases of claims for other forms of loss. Stress was laid on the advantage of securing an effective international code regarding the recognition of mortgages and the extent to which maritime liens should be allowed precedence of mortgage claims, and a mild recommendation in favour of the acceptance of the Conventions<sup>3</sup> was attained. On the much more vital point of allowance of drawbacks in the country of export in valuing goods for importation, a point of special importance in connexion with the operation of anti-dumping clauses in Dominion Acts, no result was arrived at. Nor was any more effective result achieved in another case of importance, the question of levying

<sup>1</sup> *Parl. Pap.*, Cmd. 2702.

<sup>2</sup> Australia Act No. 22 of 1924 ; No. 58 of 1922 of New Zealand is not to this effect.

<sup>3</sup> See *L. Q. R.* xlii. 312-16.

income tax on non-resident traders. The attitude of the Imperial Government on this head was moderate ; it merely pointed out that it was possible and in the *Income Tax Act*, 1918, had been made operative, to confine the tax on the merchandising profits in any country of a trader not there resident, as opposed to the manufacturing profit which might be taxed in his country of residence. But India declined outright to adopt the system, and the representatives of Canada and the Commonwealth admitted that they could not bind the provinces or the States, and that the British plan was not generally in operation there.

It was rather disappointing to find that Canada had not taken any step to implement the agreement of the Conference of 1923 in favour of taxing Governmental trading activities ; the Commonwealth and New Zealand had likewise not passed special Acts, but held that the existing legislation sufficed to permit of levying the proposed taxation, but the Commonwealth emphasized that it could not speak for the States. On the other hand the Union of South Africa, Southern Rhodesia, Newfoundland, and India had in one way or another brought their legislation into harmony with the project, and the Irish Free State concurred in it, holding, however, that the matter had no real interest for the territory at the time, in view of the agreement with the United Kingdom on the subject of double income tax.<sup>1</sup> It was agreed that sufficient progress had been made to render it proper to approach foreign Governments with a view to the conclusion of conventions for the taxation of Governmental trading concerns, without prejudice, however, to the national interest of sovereign States in any emergency of war.

On the proposal of Mr. Bruce a general approval was given to the idea of the production of surveys of particular trades, showing production and purchase within the Empire, in order to inform manufacturers and others of opportunities for trade within the Empire, although it was admitted that much in this connexion was already being done by the several Governments concerned, and in fact it is by no means clear what special purpose will be served by the new proposals.

Forestry evoked special attention from a special Sub-Committee which emphasized the shortage in world supply of soft-

<sup>1</sup> Made effective in 1926 ; Cmd. 2632 and 2654.

woods, which represent 80 per cent. of the wood consumption of the world, and in the supply of the hardwoods of temperate countries, though it was recognized that this defect could be made good by an extended use of tropical hardwoods. It was agreed that it was a matter of pressing necessity that forestry operations should be carried on with a definite aim of securing the sustained production of timber. Note was taken of the good work accomplished by the Standing Committee on Empire Forestry, of the performance of the Imperial Forestry Institute at Oxford, and of the Empire Forestry Association, whose Journal affords an effective means of dissemination of information regarding technical matters. The invitation of Australia and New Zealand to a Forestry Conference there in 1928 was welcomed, as was an intimation by the Union of its desire for such a Conference, in 1933, and to the Conference of 1928 was referred the question of creating an Empire Forestry Bureau.

A question of no small importance, and a novel issue at an Imperial Conference, arose in the effort to secure the wider use of British films in supersession in some degree of the domination of American films. There was no disagreement as to the objections to the prevalence of the use of American films, but the results of investigations as to modes of combating the difficulty were not remarkable. The proposals submitted to the Sub-Committee were varied : heavy customs duties on foreign films ; the free entry of or ample preference for British films ; legislation for the prevention of 'blind' or 'block' booking of films ; and the imposition of requirements as to the renting or exhibition of a minimum quota of Empire,<sup>1</sup> that is virtually British, films. It was admitted, as obvious, that the producers of British films must show resource, enterprise and adaptability if they were to profit by any aid accorded, but it was also agreed that there might be a very real possibility of affording a real impetus to the industry by timely legislative help, and above all by the creation of effective arrangements for the distribution of films throughout the Empire. The importance of extending the use and production of educational films such as those of the resources of the Empire shown at Wembley in 1924-5 was emphasized, and the question of the employment of such films in education was commended for consideration by the Imperial Education Conference of 1927.

<sup>1</sup> Victoria passed legislation for a quota in 1926.

The exchange of information between Empire Governments as to progress in film production was also recommended.

In the sphere of workmen's compensation there was general approval of giving effect to the draft Convention achieved at Geneva in 1925<sup>1</sup> in so far as this had not already been done, with regard to the extension to aliens of the same treatment as that accorded to nationals. Moreover it was agreed that it was desirable that arrangements should be made where persons in receipt of capital sums in respect of compensation went to settle in some other part of the Empire, the sums to which they were entitled should be administered by the appropriate authority in the place of their new residence.

The question of standardization received careful consideration in view of the enormous saving in carrying stocks which could be effected by this device ; stress was laid on the danger of Governmental intervention where unnecessary and on the promotion of agreement between producers and users. Exchange of information and co-operation between Governments in adoption of common standards was recommended. Statistics were considered ; improvements possible in the existing Abstract of Oversea Statistics published by the Board of Trade were announced, and the possibility of further changes relegated to the future, for consideration if necessary by a technical Conference. As regards statistics of the production, stocks, and consumption of wool, it was recognized that the publication of Empire statistics alone might merely confer on foreign producers advantages, if foreign statistics were withheld, and it was agreed, therefore, to seek international co-operation in publishing the desired information. A similar decision was reached as regards statistics of food stuff in cold storage, a matter of vital importance to Dominion exporters. These resolutions accord with the stress laid throughout the Conference on the need for co-operation in Empire marketing.

Air communications again revealed the activity of the Imperial Government and the timidity of the Dominions. Stress was laid by the Imperial Government on their projects for the establishment of an air service from Egypt via Basrah to India, and ultimately via Burma and Singapore to Australia, on the one hand, and from Egypt to South Africa via Uganda, and on

<sup>1</sup> See *Parl. Pap.*, Cmd. 2536.

the prospect of a short journey of two and a half days by airship to Canada. To aid the latter project Canada readily promised mooring masts and meteorological observation. Mr. King stressed the great work of aerial survey and forest protection carried out in Canada, reminding the Conference of the remarkable aptitude for air work shown by Canadians in the Great War. Mr. Bruce cited the large amount of use of aeroplane services made in Australia, hinted at the use of aeroplanes to shorten the mail service between Perth and Adelaide, admitted that the airship was still experimental, but would consider providing a mooring mast. Mr. Coates did not commit his Government even so far, and admitted that for lack of opportunity the air sense was little developed in New Zealand. The Union use of aeroplanes for defence was stressed, but civil aviation, it was explained, was left to outside enterprise ; landing grounds were available, and a mast would be considered. The Irish Free State expressed interest in a project of a service to Canada, while Newfoundland recognized that in such a service she could hardly play any part. India justly claimed that her constitutional position should be recognized as regards any proposed air service, and that she should be a principal in any contract for a service to India, all hangars, aerodromes, and apparatus being paid for and becoming the property of the Indian Government. Mr. King finally urged the desire of Canada that the next Imperial Air Conference might be held in that Dominion. It was agreed also by Australia to co-operate in trial flights by the local air force to Singapore, with Imperial experiments from Singapore, and a similar understanding was reached as to flights from the Union to Kisumu. Exchange of information on civil aviation and of personnel was recommended. No progress whatever was made as to improved steamship communications between Great Britain, Australia, and India, and Great Britain and New Zealand.

Research was investigated by a Sub-Committee, whose report was enlivened by a note of Lord Balfour's composition. Stress was laid on the advantage of work in co-operation and exchange of information as to fisheries, agriculture, forestry, minerals, and industrial questions, on the importance of encouraging men of ability to take up such work, and on the excellent results already achieved as regards cotton growing. Note was taken

of the progress made since 1923 in the reorganization of the Imperial Institute and suggestions adopted to improve the prospects of satisfactory work by the Imperial Agricultural Research Conference of 1927. A discussion of the Antarctic between the parts of the Empire interested involved consideration of the seven areas to which a British title by discovery existed, and special attention was devoted to the possible utilization of these areas for developing exploration and scientific research in the Antarctic region.

The Empire Press League urged the question of improved facilities for the dissemination of British news throughout the Empire, and their representations were received with general sympathy, if no immediate result.

One really controversial issue fell to be disposed of, the protests made by Canada in respect of the work of the Pacific Cable Board. In November 1925 <sup>1</sup> the Dominion Postmaster-General issued a strong protest against the award of £2,260,000 contracts to provide for the duplication of the existing cable between Bamfield, Fanning Island, and Fiji, on the ground that duplication had been decided upon in the absence of the Canadian representative and the contracts awarded despite Canadian protests. He insisted that new work should only be undertaken with the concurrence of all concerned, suggested the withdrawal of Canada and the refusal of landing rights in the Dominion. A Committee was appointed to deal with the deadlock, and it was announced in the course of the Conference that the matters in dispute had been amicably adjusted, and that new provisions would be made for the mode of choosing the Chairman, and for the disposal of any surplus assets. Thus ended an unfortunate episode in respect of which Canada seems to have had just reason of dissatisfaction.

<sup>1</sup> *Canadian Annual Review*, 1925-6, pp. 147, 235; *Parl. Pap.*, Cmd. 2769; *Pacific Cable Act*, 1927.



## APPENDIX

### A. *Tasmanian Money Bills*

The remarkable view of the fundamental principles of the law of the Tasmanian constitution taken by Mr. A. G. Ogilvie, the Attorney General, and Sir H. Nicholls, C.J.,<sup>1</sup> was naturally not shared by the leading Australian counsel to whom the issue was submitted on behalf of the Farmers', Stockowners', and Orchardists' Association, but their views, unhappily, were not published until May 1926.<sup>2</sup> Sir Edward Mitchell, Mr. David Maughan, and Mr. J. H. Keating were agreed that the Bills had not been duly passed, and that the presentation by the Attorney General for the assent of the Administrator was not justified. They recognized, inevitably, the impossibility of any injunction being obtained by a taxpayer forbidding the Treasurer to make payment under the *Appropriation Act* thus wrongfully assented to, a view for which, it may be noted, there is judicial authority in the Transvaal,<sup>3</sup> but they held that it would be perfectly open to any taxpayer to obtain a judicial decision on the validity of the second of the Acts improperly assented to, the *Land and Income Tax Act* (No. 2), 1924 (15 Geo. V, No. 70). S. 5 of that Act forbade the deduction of Federal income tax from income for assessment to State income tax for the year ended 30 June 1923, and by insisting on the right to deduct, which was to be continued by the amendment made by the Council, but rejected by the Assembly, the question could have been definitely disposed of by the Court. It was agreed by these high authorities that the Court would not refuse, on suitable evidence being tendered, to go behind the apparent enactment in due course of the measure. Sir E. Mitchell also pointed out that, as the *Appropriation Act* was invalid, it would later be possible to obtain repayment of any sums paid under it in accordance with the decision in the *Auckland Harbour Trust* case.<sup>4</sup>

The matter, however, was settled by agreement. On 3 March 1926 the Council passed a Bill repealing s. 33 of the *Constitution Act* and defining the relative powers of the two houses, and after reservation the measure became law as 16 Geo. V, c. 90. All appropriation or taxation measures must begin in the Assembly, with the usual exception for imposition or appropriation of fines, pecuniary penalties, and fees for licences or services, and the usual rule for the necessity of

<sup>1</sup> *Tasmania Parl. Pap.*, 1924, No. 41.

<sup>2</sup> *Tasmania Daily Telegraph*, 29 May 1926. I owe copies of these opinions to the kindness of Mr. Keating.

<sup>3</sup> *Dalrymple v. Colonial Treasurer*, [1910] T.P. 372.

<sup>4</sup> [1924] A.C. 318.

recommendation of all money votes by the Governor. An Appropriation Bill cannot deal with anything save the issue, application, and appropriation of moneys out of the revenue for meeting the ordinary annual services of the Government, for a period not exceeding one year. Any provision not of this kind in an Appropriation Act shall have no effect. Income Tax and Land Tax Rating Acts must deal solely with the fixing or declaration of rates; otherwise they shall be of no effect. The Council may not amend Bills of any of these three kinds, but may amend any other vote, resolution or Bill, but may not by such amendment insert any provision for the appropriation of moneys, or impose or increase any burden on the people. The Council may request amendments in any Bill which it cannot amend, at any stage of its progress, and the Assembly may, if it think fit, insert or delete any provision or amend it as desired by the Council or with modifications.<sup>1</sup> The Council may reject any resolution, vote, or Bill, and its powers are asserted to be equal with the Assembly save as expressly provided in the measure.<sup>2</sup>

#### *B. The South African Settlement with India of 1927*

The Conference between representatives of the Union and the Indian Governments met at Cape Town on 17 December, and concluded their labours on 11 January 1927. The agreement reached, which both Governments approved, was notified on 21 February by Dr. Malan in the House of Assembly. The essence of the agreement is the abandonment by India of any claim that her citizens should be entitled to remain in the Union unless they are prepared to conform to Western standards of life. Those who are so prepared will be entitled under the agreement to expect facilities for doing so from the Union. Others should look for permanent homes outside the Union, and their departure will be assisted by the Union Government, while the Indian Government undertakes to look after emigrants on their return to India. After three years' absence such emigrants will lose their Union domicile, and will not be eligible for admission to the Union, while, if they desire to return within that period and thus to preserve their domicile, they can do so only subject to refunding the cost incurred in their emigration by the Union. Those permanently

<sup>1</sup> For the legal effect of the measure, cf. above, p. 438, regarding the Western Australian legislation of 1921. It may be added that by 15 votes to 5 the Legislative Council of that State, in December 1926, rejected a Bill passed by the Assembly to establish a householder franchise and to deprive voters of their present privilege of plural voting in respect of a qualification in each of the ten electoral provinces.

<sup>2</sup> The general election of 1926 prevailed on the Canadian Senate to pass, in 1927, the Bill providing for the co-operation of the federation with the provinces as regards the grant of old age pensions.

domiciled in the Union will be entitled to the right to have their wives (monogamous) and children, if minors, admitted to the Union in accordance with the terms of Resolution 2 of the Imperial War Conference of 1918. The Indian Government was invited to appoint an officer in the Union (the Rt. Hon. Srinivasa Sastri has accepted the post) to secure effective co-operation between the two Governments, and, as a concession, the Areas Reservation and Immigration and Registration (Further Provision) Bill was not proceeded with. Stress was laid on the fact that neither party to the agreement was bound for any definite time; the Union retained its right to legislate as it thought best, and the Indian Government was not pledged to continue to co-operate indefinitely.

The solution, accordingly, amounts to an attempt to assimilate a certain number of the Indian population to the Cape coloured population, and to remove the remainder; its success must essentially depend on the success of the emigration scheme, the difficulties of which are considerable, and on the genuineness of the efforts to open up possibilities of Western civilization to those Indians who desire to make South Africa their permanent home. It is clear that the Indian Government has spared no effort to be conciliatory, while the Nationalist Government had unquestionably grave difficulties to contend with from its followers. It is inevitable that the solution arrived at in South Africa should have an effect on the position of the Indians in the territories under Imperial control in East Africa where, it appears from the House of Commons discussion of 19 July 1927, the policy is to be inaugurated of subordinating the interests of the native population and the Indian immigrants alike to the welfare of European settlers, regardless of the obligations of trusteeship affirmed so recently as 1923. The decision marks a distinct deterioration of British conceptions of fair play to native populations, and is an interesting illustration of the operation of Dominion modes of thought on Imperial statesmen.

### *C. The Defence of Rhodesia*

In December 1926 the Legislature passed a Bill which assimilates the position of Southern Rhodesia in matters of defence to that of the Union. Defence includes only the defence of the colony whether from attack from without or internal insurrection, and no power is given to use the forces provided for Empire defence, though for local defence service within or without the Colony is authorized. In war time all citizens between 18 and 60, both inclusive, are liable to render personal service, while those between 19 and 23 are required to undergo peace training, and may begin at age 18; due allowance is made for those who have become efficient as cadets. Those not being trained

are to be enrolled in Territorial Force Reserve Units and instructed in the use of arms. The rules do not apply to non-Europeans, but voluntary enlistment of such persons is not prohibited. The Territorial Force in three divisions will be supplemented by a Reserve and by the Permanent Force which includes the British South Africa Police, and the Governor will be advised by a Council of Defence in the administration of the measure. In enforcing training due regard will be had to financial considerations and to the circumstances of individuals as in the Union of South Africa. The measure was justified by the general approval of the electorate, the risk of native disturbance, and the possibility of unrest in South Africa arising from the movement for independence in the Union. It is significant that this last ground was stated before the announcement, after the Imperial Conference of 1926, of the intention of the Nationalist party in the Union to abandon the claim for independence in view of the full recognition of the status of the Union accorded by the Conference.

#### *D. The Financial Relations of the Commonwealth and the States*

The Premiers' Conference of 1927 in Melbourne accepted in principle certain proposals placed before them by Mr. Bruce defining anew the financial relations between the central and the State Governments. It was explained that in the view of the Commonwealth Government no useful purpose for Australia would be served by the mere taking over of State debts, unless such provision was made for co-operative action regarding future borrowing as would secure the full financial advantages which should accrue from the union of the States in a federation. The scheme, therefore, provides for the taking over of the State debts (say £646,000,000 net) on 1 July 1929, and for the extinction of all State debts in a period of 58 years from 1 July 1927 by means of sinking funds, of 7s. 6d. per £100, of which a third (£808,000) will be provided by the Commonwealth, which will also pay £7,585,000 a year towards interest charges in lieu of the subsidies of 25s. a head formerly granted to the States. New loans raised for the States after 1 July 1927 shall have a sinking fund of 10s. per £100, borne equally by the Commonwealth and the State concerned; the managements of sinking funds shall be vested in the Australian National Debt Commission, which will cancel debt, while on all cancelled debt the States shall pay  $4\frac{1}{2}$  per cent. interest until the expiration of the sinking fund period, new loans thus being paid off in 53, old loans in 58, years. New loans will be dealt with by the Australian Loan Council,<sup>1</sup> consisting of one representative of each State and of the Commonwealth, and, subject to its control, the

<sup>1</sup> For the arrangements of 1925-6, see *Parl. Deb.*, 1926, p. 4915.

Commonwealth will undertake all future loan transactions. The Council will determine from time to time what sums can be borrowed at reasonable rates and will allocate the funds to the Commonwealth and the States by unanimous vote, or in default in accordance with an agreed formula; other questions will be decided by a majority vote, the Commonwealth having three votes, each State one, but defence borrowings are not included in the scheme. The Commonwealth further takes over liability for the principal, and interest at 5 per cent. of State debts amounting to £11,036,000, the agreed value of State properties taken over by the Commonwealth. The necessary constitutional change to effect the purpose of the scheme would provide that Parliament may, for carrying out or giving effect to any agreement made or to be made between the Commonwealth and the States, make laws with respect to the public debts of the States, including the taking over of such debts, management, payment of interest, and provision and management of sinking funds, consolidation, renewal, conversion, and redemption, the indemnification of the Commonwealth by the States, and the borrowing of money by the States or by the Commonwealth for the States. Temporary proposals cover the period pending the passing of the necessary legislation by the six State Parliaments to approve the scheme and the enactment by referendum of the necessary alteration in the Commonwealth Constitution.

It should be added that the High Court has made it clear that it is not possible for the States to levy a petrol tax, such as that of 3*d.* a gallon imposed by Act No. 1681 of South Australia in 1925<sup>1</sup> on vendors of motor spirit, on the score that such a duty is one of excise, and similarly on 3 March 1927 it was ruled that a tax on newspapers in New South Wales of  $\frac{1}{2}$ *d.* a copy was also invalid as an excise duty. On the other hand the Court has ruled that it is perfectly legal for the Commonwealth to pass the *Federal Aid Roads Act*, 1926, which provides an elaborate scheme for aiding the States in the construction of main roads; the legality of the measure was strongly contested in the Senate by Sir H. Barwell,<sup>2</sup> who cited the opposition of Mr. Latham, when a private member in 1925, to a similar measure. But the Bill was justified by Mr. Latham himself, as Attorney-General, in the Lower House<sup>3</sup> on the score that it was definitely framed as action under s. 96 of the Constitution, which permits the grant of assistance by the Commonwealth to the States on such conditions as it thinks fit. In August 1927 a Royal Commission was set up to report on constitutional changes.

<sup>1</sup> See *J.C.L.* VIII. ii. 100.

<sup>2</sup> See *Parl. Deb.*, 1926, pp. 5111. Contrast Senator McLachlan, pp. 5123 ff.

<sup>3</sup> *Parl. Deb.*, 1926, pp. 4682 ff.

*E. The South African Flag*

Pressure on the part of the more extreme Nationalists rendered it necessary for General Hertzog on his return from the Imperial Conference, despite his emphatic assertion of his acceptance of the position of the Union within the Empire as adequate and Mr. Tielman Roos's declaration on 2 December 1926 that he also regarded the issue of secession as dead, to proceed with the proposal to create a national South African flag to supersede the Union Jack. The strong opposition which manifested itself was proved by the transference of votes in the provincial elections from the Labour party, because it was bound by its pact with the Nationalists to support the Administration on the flag issue. After various efforts to arrive at a compromise, which were marked by the readiness of the South African party to accept a device which gave equal pride of place to the Union Jack and the flags of the old Republics, General Hertzog finally decided to carry in June 1927 a Bill submitting to a referendum a flag whose design is orange and blue horizontal stripes with a white stripe in the middle, on which is a quartered shield including in one quarter the Union Jack, in another a Vierkleur, another Vierkleur in a third, and four stars representing the provinces in the fourth. This, according to a Labour amendment, is to be the national flag of the Union, when accepted by referendum, while the Union Jack symbolizes the association of the Union with the other members of the British Commonwealth of Nations. It was explained that, as a result of the amendment, both flags would be flown daily in the Union. In the Senate, General Smuts' majority carried by 17 votes to 12 a proposal for an oblong flag quartered by a white cross, the left hand top quarter being filled by the Union Jack, and the other quarters by the Free State and Transvaal flags and four stars, the essential change being the making of the old emblems dominant factors, in lieu of relegating them to minimal positions on a shield. The Assembly, as was inevitable, rejected the proposal, thus necessitating a joint session of the two Houses, to be followed, when the Assembly plan prevails, by the referendum provided for in the Assembly proposals.

*F. The Diplomatic Representation of the Dominions*

Somewhat unexpectedly very shortly after the conclusion of the Imperial Conference, notification was made by the Secretary of State of the United States that the President had decided to appoint the United States Ambassador to Belgium to the office of United States Minister to Ottawa, and the United States Counsellor of Embassy in London to the post of first United States Minister to the Irish Free State. These appointments, of course, corresponded with the appoint-

ments of diplomatic representatives of Canada and the Irish Free State already made to Washington, which, however, had up to then preferred not to reciprocate. The appointments appear clearly to have been made after consultation with, and with the full approval of, the Imperial as well as of the Canadian and the Free State Governments respectively, and the Ministers were necessarily accredited to the heads of the Canadian and the Irish Free State Governments as representatives of the King.<sup>1</sup>

It had been generally anticipated that no further steps to increase diplomatic representation would be taken by any Dominion at an early date, there being special reasons for such representation in the case of the United States, but Mr. Mackenzie King, speaking at Ottawa on 2 July 1927 in honour of the United States Minister to Canada, expressly intimated that it was anticipated that he would be the precursor of a number of other diplomats at the Canadian capital, and that additions would be made to the diplomatic representation of Canada abroad. The policy has been criticized in Conservative circles in the Dominion, as tending to involve the danger of a divergence from the principle of the unity of Imperial foreign policy and diplomatic representation, which Mr. King homologated at the Imperial Conference of 1926;<sup>2</sup> but it is clear that no breach in the essential unity of the Empire is necessarily involved in the policy in question. The essential basis of that unity lies not in the personality of negotiators, but in the control exercised by the Imperial Government in respect of the issue of full powers to sign treaties and of instruments of ratification of treaties, such control appertaining to that Government, not in its own right as a superior Government, but as a trustee for the whole of the Empire, and existing in order to secure that any question of vital importance to the Empire may be brought before the Imperial Conference, or the Governments composing it, for discussion before any final action is taken.<sup>3</sup>

In accordance with the decision of the Imperial Conference, on 9 March 1927, formal intimation was made to the Council of the League of Nations by Sir A. Chamberlain with the assent of representatives of Canada, the Commonwealth, and the Irish Free State,

<sup>1</sup> Mr. Fitzgerald, in *Dáil Éireann*, 23 Feb. 1927. On the governmental reconstruction after the General Election of June 1927 the Ministry of External Affairs was given to Mr. Kevin O'Higgins, but he was assassinated on 10 July, probably as a reprisal for the execution of Republicans ordered in 1922-3.

<sup>2</sup> In the same spirit Canada informed M. Rosengolz on 3 June 1927, through the Foreign Office, that the Agreement of 16 Mar. 1921, between the United Kingdom and the Soviet Government, would no longer apply to Canada.

<sup>3</sup> South Africa instituted from 1 July 1927 a department of External Affairs under the Prime Minister. This accords with the decision to eliminate correspondence via the Governor-General, as in Canada and the Free State.

that it was desired that in future treaties concluded under the auspices of the League should not be made in the form of treaties between States. 'The common practice before the treaty of Versailles was for treaties and conventions to be made in the form of an agreement between the heads of States. The Governments of the British Empire hope that, instead of the novel form adopted for the first time in the treaty of Versailles being continued, treaties hereafter concluded under the auspices of the League may be made to conform to the general practice followed in the case of other treaties, and may be expressed as an agreement between the heads of States.' It was urged in support of the request that it would 'facilitate the acceptance of such treaties by the Governments of the British Empire, and thus help forward the work of the League'. The notification involves as its substantial effect the doctrine that treaties thus concluded and signed separately by representatives of the various parts of the Empire for those parts will not be binding on the parts of the Empire *inter se*, despite the fact that it is a matter of common practice for agreements to be made by Governments representing His Majesty in different aspects, e.g. the agreements as to pecuniary relations between the Governments of His Majesty in the Commonwealth and in the States of Australia.

#### G. *Constitutional Changes in the Irish Free State*

As a sequel to the assassination of Mr. K. O'Higgins, the Government of the Irish Free State introduced into the Dáil in July three measures of the greatest constitutional importance, justifying their action by the danger to the stability of the Constitution suggested by the murder. The first would amend the Constitution by deleting the provisions for the institution of the initiative of Article 48 of the Constitution, under which it would be possible, though the procedure would be slow, for the Republican party to secure a popular vote on the question of the amendment of the Constitution by the omission of the present oath of allegiance, which must be taken before the representative of the Crown or some person deputed by him. The second would render a promise to take the oath obligatory on any candidate for election to Parliament, and deprive an elected member automatically of his seat if he does not take the oath within two months after the assembling of a new Parliament. The third, the *Public Safety Act*, confers on the Government extraordinary powers to deal with seditious newspapers, and to suppress associations deemed dangerous to the public peace, severe penalties being imposed on members of such associations. Further, Special Courts may be set up, including military as well as



judicial officers, by Proclamation for three months, and the Proclamation may be renewed. From these Special Courts no appeal lies, and the death penalty, which is normally confined to cases of murder and treason, may be imposed for the possession of firearms without authority, if and when the Government<sup>1</sup> decides that the state of the country warrants the bringing into force of the provisions of the measure.

The proposals form an interesting illustration of the sovereignty of Parliament, as none of them were suggested to the electorate before the general election. It is noteworthy also that the ministry, which in the preceding Parliament enjoyed the support of a majority of the members of the Dáil, no longer possessed an independent majority, being in fact outnumbered by the two sections of the Republicans (Fianna Fail and Sinn Fein), who, at first, by declining to take their seats in view of their objections to the oath, were unable to exercise any influence on the Administration. Strong protests were raised by the Labour opposition to the Public Safety Bill, and on 28 July Mr. Johnson asserted that his party was prepared to accept the responsibility of governing, either alone or in association with the Farmers' party, the National party, or the Independents, or would give generous support to any of these elements in forming a Government. The statement is important as marking the transition to more normal political relations in the Free State. The general election showed, as usual when proportional representation is applied, the appearance of a large number of parties and cross-voting, eliciting suggestions for abandonment of the system.

In August the passing of the *Public Safety Act* with a declaration by both Houses of urgency, which precluded the application of the provision in Article 47 of the Constitution for its suspension and submission to a referendum, and the passing<sup>2</sup> of the Electoral (Amendment) (No. 2) Bill offered so grave a menace to the safety and liberty of the members and supporters of Fianna Fail that Mr. de Valera agreed to a complete change of policy. It had long been argued that there was nothing incompatible in taking the oath, while continuing to work for complete independence; in the Union of South Africa Nationalist members and ministers have never hesitated to regard their oaths as quite compatible with working openly for independence. This view now prevailed; the members of Fianna Fail took

<sup>1</sup> The power, as usual, is given to the Executive Council alone, ignoring the Governor-General. Further, the widest authority to expel opponents from the State is given to the Minister of Justice.

<sup>2</sup> Now suspended in operation for demand for referendum, by more than two-fifths of Dáil.

the oath, and on 16 August the Government was challenged by a combination of Fianna Fail, the National League, and the Labour Party, but was upheld by the casting vote of the presiding officer in the Dáil on an equal division of 71, the Government having the support of the Farmers' Party and the Independents. The Sinn Féin members did not accept the policy of entering the Dáil, and opinion in the ranks of Fianna Fail was divided. The decided victory immediately after achieved in two by-elections by the Government was held by Mr. Cosgrave and the Governor-General to justify an immediate dissolution<sup>1</sup> of Parliament. It may be noted that the Labour leader, who had intended to form a ministry with Fianna Fail support, asserted adherence to the treaty, though apparently prepared to seek the consent of the United Kingdom Government to a modification of the treaty of 1921 in this point. Lord Birkenhead, on the other hand, declared this provision inviolable, but in view of the whole circumstances it appears impossible in the long run to insist on imposing on the Free State an obligation of the most dubious moral value.

<sup>1</sup> Had Mr. Cosgrave been defeated, this could not legally have been accorded to him under the constitution (cf. vol. i, p. xxiii above). For his justification see his manifesto of 26 August; the dissolution elicited protests from Mr. Johnson and Mr. de Valera, but Mr. Healy's action was not contrary to constitutional principle, especially in view of the necessity of raising a national loan to facilitate agricultural credit. The dissolution gave no decisive result, but Canada's election to membership of the Council of the League of Nations may satisfy Irish opinion that full freedom is compatible with inclusion within the British Empire.



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